**Testimony before the**

**U.S. HOUSE COMMITTEE ON FINANCIAL SERVICES**

regarding

"Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information"
June 19, 2007


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Mr. Chairman, Representative Bachus, and Members of the Subcommittee, the National Consumer Law Center thanks you for inviting us to testify today regarding accuracy in credit reporting and the Fair Credit Reporting Act (FCRA) dispute process. We offer our testimony here on behalf of our low income clients.[1]

Mr. Chairman, we thank you for holding this hearing to examine the issue of how errors in credit reporting affect consumers, and whether they are able to correct errors using the FCRA dispute process. The short answer is that the American credit reporting system is rife with errors that are predictable and preventable, and the dispute process - the safety net designed to correct those errors - is full of gaping holes. This failure has created economic harm, hardship, and distress for untold numbers of consumers. Specifically, we discuss how:

- Credit reports are plagued by inaccuracies, such as files mixing the identities of consumers, errors caused by furnishers of credit information, the fallout caused by identity theft, stale information "re-aged" by debt collectors, and missing credit limits.
- The consumer reporting agencies (CRAs) conduct the dispute reinvestigations required by the FCRA in an automated and perfunctory manner. The CRAs translate detailed written disputes submitted by consumers into two or three digit codes, and fail to send supporting documentation to furnishers.
- Some furnishers themselves conduct non-substantive investigations that consist of nothing more than verifying the challenged data by comparing the notice of dispute with the recorded information that is itself the very subject of the dispute. The CRAs then "parrot" the furnisher's self-fulfilling results also without conducting any independent review, with the ultimate effect that no one ever investigates the substance or merits of the consumer's complaint.
- CRAs have little incentive to conduct proper disputes or improve their investigations. They treat disputes as a nuisance, and the investigation of errors as a money drain, devoting as little resources as possible by using automation that produces formalistic results.
- Consumers need help from Congress and vigorous enforcement by regulators to fix these problems. Consumers should have the ability to ask a court to order the CRAs and

[1] The National Consumer Law Center is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen many examples of the damage wrought by inaccurate credit reporting from every part of the nation. It is from this vantage point – many years of observing the problems created by incorrect credit reporting in our communities – that we supply these comments. *Fair Credit Reporting* (6th ed. 2006) is one of the eighteen practice treatises that NCLC publishes and annually supplements. This testimony was written by Chi Chi Wu, with assistance from Lauren Saunders of NCLC and Richard Rubin.

furnishers to correct errors on their credit reports. Regulators also need to be aggressive in setting firm standards and requiring the CRAs and furnishers to obey current laws.

## I . The Important Role of Accuracy in Credit Reports and the Unique Market Forces in that Industry

Congress enacted the FCRA in the explicit recognition that the health of the consumer banking and credit system "depend[s] upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." 15 U.S.C. §1681(a)(1), (a)(4), and (b). Congress realized that credit decisions made on the basis of faulty information undermine the vitality of the consumer credit system and the ability of Americans to enjoy the fruits of this country's material prosperity. Failure within this system is not only expensive but also severely disruptive, while accuracy keeps the system running well. Congress designed the FCRA to increase that accuracy.

While critically important to consumers and the national economy, the credit reporting industry is unlike most other industries in some fundamental respects. It is essential to keep in mind that the paying clients of the credit reporting industry are not consumers, but the creditors who furnish or use the information contained in the CRAs' databases. Moreover, consumers have no say in whether their information is included in the CRAs' databases. Most Americans cannot avoid having a credit history. Unless they are very wealthy, consumers will need to borrow money if they want to buy a house or attend college.

Thus, unlike almost all other business relationships, consumers who are unhappy with the actions of a CRA cannot vote with their feet – they cannot remove the information or take their business elsewhere. Creditors, in contrast, do have the ability to switch between CRAs if they wish. And vigorous investigation of consumer disputes is likely to drive creditors away. Traditional competitive market forces therefore provide little incentive for CRAs to incur the costs to institute new procedures that ensure information is accurate or to undertake investigations to correct errors, since these activities primarily benefit consumers. Only the FCRA itself compels such behavior.

## II. Inaccuracies Abound in the Credit Reporting System

Unfortunately, despite Congress's explicit purpose in enacting the FCRA, the consumer reporting system does not provide accurate information to its users. In the hearings that led to the Fair and Accurate Credit Transactions Act of 2003 (FACTA), Congress was presented study after study documenting errors in credit reports. For example, a study by the Consumer Federation of America and National Credit Reporting Association documented numerous serious errors and inconsistencies, such as the fact that 29% of credit files had a difference of 50 points or more between the highest and lowest scores from the three nationwide CRAs (i.e., Equifax, Experian and Transunion).[2] Members of Congress cited studies from U.S PIRG showing errors

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[2] *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs*, 108th Cong. 381 (2003)(statement of Stephen Brobeck, Executive Director, Consumer Federation of America).

in 25% of credit reports serious enough to cause a denial of credit.[3] This level of inaccuracy continues after FACTA, with the most recent study by U.S. PIRG showing no improvement and finding that 25% of credit reports studied still contain serious errors.[4] Even the Consumer Data Industry Association (CDIA) has admitted that, out of 57.4 million consumers who ordered their own credit reports in 2003, 12.5 million (or 21.8%) filed a dispute that resulted in a reinvestigation.[5]

There are many types of errors in credit reports; we focus on a few of the most egregious.

*Mixed files*

Mixed or mismerged files occur when credit information relating to one consumer is placed in the file of another, thus creating a false description of both consumers' credit histories. Mismerging occurs most often when two or more consumers have similar names, Social Security Numbers (SSNs), or other identifiers (for example, when information relating to John J. Jones is put in John G. Jones' file).

Mixed files occur largely because the CRAs' computers do not use sufficiently rigorous criteria to match consumer data precisely, even when such unique identifiers as SSNs are present. For example, CRAs will include information in a consumer's file even when the SSNs do not match, but other information appears to match.[6] Thus, they have been known to mismerge files when the consumer's name is similar and they share seven of nine same digits in their SSN.[7]

The case of Eric Carroll documented by the Boston Globe is, at a minimum, a mixed file case.[8] It may be an identity theft case, but as discussed below, that crime is often facilitated by the CRAs' loose matching criteria. Other recent mixed file cases include the case of Victoria Apodaca, whose file was mixed with the file of Victoria Lopez Apodaca because they had the same last and first name, seven of the nine digits in their SSN matched, and they both resided in the state of New Mexico.[9] Despite filing dispute after dispute with the CRAs, Ms. Apodaca was unable to get her credit report fixed until she took legal action.

Mixed files could be prevented by requiring the CRAs to use strict matching criteria, for example requiring an exact match on SSNs, or could be reduced by merely requiring an eight of nine SSN match. However, the CRAs have chosen to be excessively and unreasonably over-inclusive because, as the Federal Trade Commission (FTC) noted "lenders may prefer to see all potentially derogatory information about a potential borrower, even if it cannot all be matched to the borrower with certainty. This preference could give the CRAs an incentive to design

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[3] *Id.* at 351 (statement of Senator Paul S. Sarbanes).
[4] Nat'l Ass'n of State PIRGs, Mistakes Do Happen: A Look at Errors in Consumer Credit Reports 11 (2004) .
[5] FTC/FRB August 2006 Report at 12.
[6] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003*, at 40 (Dec. 2004) (hereinafter "FTC 2004 Report").
[7] Apodaca v. Discover Fin. Servs. 417 F.Supp.2d 1220 (D.N.M. 2006). Practitioners report that one nationwide CRA relies on a match of as few as five of the nine digits in an SSN.
[8] Beth Healey, *Credit Agencies Lag on Errors, Fraud*, Boston Globe, Dec. 28, 2006.
[9] Apodaca v. Discover Fin. Servs. 417 F.Supp.2d 1220 (D.N.M. 2006).

algorithms that are tolerant of mixed files."[10] Despite this, the FTC has supported the CRAs' position in opposing stricter matching criteria, arguing that the costs outweigh the harm to people like Eric Carroll.[11]

*Identity Theft*

With an estimated ten million consumers discovering they were the victim of some form of identify theft in a twelve month period – the fastest growing crime in this country - identity theft itself presents a serious source of inaccuracies in the credit reporting system. The identity thief, however, is not the only culprit. CRAs and furnishers bear a share of the blame as well.

Most identity theft problems are actually caused by the CRAs' loose matching procedures, discussed above. For example, if an impostor has only adopted the victim's first name and SSN but not his or her last name or address, the algorithm used by CRAs to "merge" information often will incorporate the impostor's information into the victim's file at the time the CRA compiles the report. Once the fraudulent debt is reported, often after default and non-payment, and especially when collectors begin attempting skip trace searches, the account ends up merged into the victim's file even though many of the identifiers do not match. Accordingly, the "identity theft" is really characterized as a hybrid of a mixed file problem.

Another factor contributing to identity theft is the way in which furnishers have aided and abetted identity theft with their recklessly low security controls in their granting of credit. We could not describe it better than one federal District Court judge, who stated:[12]

> In an age of rampant identity theft, it is irresponsible to allow consumers to open credit cards over the telephone, without ever requiring written verification of that consumer's identity. Citibank did not even bother to save the specific intake information that it collected over the telephone when this account was opened. These sloppy business practices facilitate identity theft. Citibank's lax record keeping permits a thief to easily accumulate thousands of dollars of debt in the name of an innocent consumer once the thief has acquired the consumer's social security number. At no time is the consumer given the opportunity to confirm that he or she ever agreed to be liable for the debt.

Many of the protections added by FACTA focused on assisting victims of identity theft. However, the most important new FACTA duties - the fraud alerts - are not proactive and instead are triggered only when consumers notify a CRA of suspected fraud. 15 U.S.C. §§ 1681c-1 and c-2. FACTA also contained several measures to prevent identity theft. Two important protections are the "red flag" guidelines and address discrepancy notice, both of which involve detecting possible signs of identity theft. The FTC and banking regulators are to issue regulations requiring creditors to establish programs to respond to these signs of identity theft.

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[10] FTC 2004 Report at 47.

[11] In the early to mid-1990s, the FTC reached consent orders with the CRAs requiring them to improve their procedures to prevent mixed files. FTC v. TRW, Inc., 784 F. Supp. 361 (N.D. Tex. 1991), *amended by* (N.D. Tex. Jan. 14, 1993); In the Matter of Equifax Credit Information Services, Inc., 61 Fed. Reg. 15484 (Apr. 8, 1996) (consent order). However, over a decade later, mixed files remain a significant problem.

[12] Erickson v. Johnson, 2006 WL 453201 (D. Minn. Feb. 22, 2006).

However, the regulators' proposed regulations incorporate far too much discretion, allowing users to reject even the most obvious signs of identity theft.[13]

*Furnisher errors*

A significant source of errors in credit reports is inaccurate information provided to the CRAs by furnishers. Furnisher inaccuracies primarily fall into two categories types. First, the furnisher might report the consumer's account with an incorrect payment history, current payment status, or balance. Alternately, a creditor may have attributed the account to a consumer who does not owe the debt, often called an "ownership dispute."

The first type of error sometimes occurs because the creditor has not complied with industry reporting standards, such as the Metro 2 format. The second type, ownership disputes, often involves a spouse or other authorized user who is not contractually liable on the account. Other times, the consumer may have been the victim of identity theft.

Any error sent by the furnisher in its computer file automatically appears in the consumer's credit report, even if the information patently contradicts information appearing in other parts of the credit report. Thus, one defect of the credit reporting system is the failure of the nationwide CRAs to exercise virtually any quality control over the information initially provided to them by furnishers. The CRAs blindly rely on furnishers and provide no oversight of the quality of the information being reported. This unquestioning acceptance and re-publication of furnisher information invites abuse. This is especially true when it comes to debt collectors and debt buyers, who present their own special types of errors discussed below.

*Re-aging of obsolete debts*

A recurring abuse that results in inaccurate reporting is the "re-aging" of obsolete debts. This problem has grown particularly prevalent and profitable in recent years with the emergence of a multi-billion dollar distressed debt industry that buys, sells, and re-buys large portfolios of defaulted and time-barred debt for pennies on the dollar and then duns vulnerable consumers for inflated sums. The FCRA requires most consumer debts to be deleted from a credit report after seven years from the date of charge-off or 180 days after the delinquency. 15 U.S.C. §1681c(a)(4) and (c).

"Re-aging" occurs when these "scavenger" debt buyers purposefully misrepresent the date of delinquency to fall within the seven-year period. The debt buyers thereby resurrect long dormant and nearly worthless debts with the simple act of false credit reporting. FACTA attempted to address re-aging by requiring debt collectors to use the date of delinquency used by the creditor. 15 U.S.C. § 1681s-2(a)(5)(B). Despite this change, re-aging abuse continues.[14]

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[13] 71 Fed. Reg. 40,786 (July 18, 2006). See Comments to the FTC re: Identity Theft Red Flags and Address Discrepancies under FATCA, Privacy Rights Clearinghouse, September 18, 2006.

[14] *See, e.g.*, Gillespie v. Equifax Information Services, 484 F.3d 938 (7th Cir. 2007); Maloney v. LVNV Funding LL, 2006 WL 3006484 (N.D. Tex. Oct. 20, 2006); Allen v. Experian Information Solutions, Inc., 2006 WL 1388757 (S.D. Ill. May 12, 2006).

Perhaps one reason for its continuation is that the changes added by FACTA were codified in a section of the FCRA that consumers cannot privately enforce.

The CRAs play a role in re-aging abuse as well, failing to control properly for debt buyers who are effectively gaming their systems. For example, Experian has been aware of re-aging or "date flipping" for several years. In one deposition, an Experian employee testified that the CRA had stopped taking the data of a one debt buyer - Asset Acceptance - and had removed Asset's data from its systems.[15] However, this employee revealed in a later deposition that Experian had allowed Asset back into its system,[16] despite Asset's proven record of abuse.

In addition, the Seventh Circuit recently expressed its concern over Equifax's procedures concerning the "Date of Last Activity" field, which is the date used by that CRA to calculate the seven year expiration period. The Seventh Circuit believed that Equifax's procedures for that field could "effectively allow Equifax the opportunity to keep delinquent accounts in the credit file past the seven and one-half year limitation of" the FCRA.[17]

<u>*Debt Buying*</u>

The purchase and transfer of old consumer debts creates other problems in addition to re-aging. These problems include pursuing collection against consumers who are not liable on the account and not providing the name of the original creditor and type of creditor involved.[18] When debt buyers collect a debt that is a decade or more old,[19] the first issue is whether the debt is still even valid, since some states prohibit any collection after the passage of the statute of limitations. Furthermore, there may be an issue as to whether the consumer really still owes the debt - the FTC alleged that 80% of the consumers from whom one debt buyer collected never even owed the debt[20] - or whether they paid it or otherwise resolved it.[21] With records long gone due to the passage of time, there is often nothing more than the victimized and hapless consumer's word against the presence of her name in an unverifiable electronic list purchased by the debt buyer.

Indeed, the fundamental problem is that debt buyers and collectors often are given nothing more than a list of debts. There is no account application, original agreement, history of periodic statements, or indication of whether any of the debt was disputed with the creditor or settled with a previous collector. The debt buyer is at fault for collecting debts on this flimsy record, and the original creditor is at fault for not providing more documentation.

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[15] Deposition of Kathy Centanni, Allen v. Experian Information Solutions, Civ. No. 04-817 (S.D. Ill. Dec. 6, 2005).
[16] Deposition of Kathy Centanni, Murphy v. Midland Credit Management, Civ. No. 05:CV-1545 (E.D. Mo. June 21, 2006).
[17] Gillespie v. Equifax Information Services, 484 F.3d 938 (7th Cir. 2007).
[18] *Collecting Consumer Debts: The Challenges of Change, Comments to the Federal Trade Commission regarding the Fair Debt Collection Practices Act*, National Consumer Law Center, June 6, 2007.
[19] For an example of a debt buyer attempting to collect on a nearly 30 year old debt, *see* Rosenberg v. Cavalry Investments, LLC, 2005 WL 2490353 (D. Conn. Sept. 30, 2005).
[20] *See* FTC Press Release, *FTC Asks Court to Halt Illegal CAMCO Operation; Company Uses Threats, Lies, and Intimidation to Collect "Debts" Consumers Do Not Owe* (Dec. 8, 2004), *available at* www.ftc.gov/opa/2004/12/CAMCO.htm.
[21] *See, e.g.,* Asset Acceptance Corp. v. Proctor, 804 N.E.2d 975 (Ohio Ct. App. 2004) (consumer claimed that he made payments toward amount claimed to be owed).

The lack of this original documentation cannot help but create inaccuracies in credit reporting. For example in a recent case, an identity theft victim disputed a delinquent credit card account opened by his ex-girlfriend.[22] The account had been sold to a debt buyer, which did not have any of the original account documents. When the victim disputed the delinquent account to a CRA, the debt buyer merely compared the data in its files that had produced the disputed information with the identical information that the CRA was naturally then reporting. The debt buyer did not request documents from the original creditor. The most that this debt buyer would do in an identity theft investigation is to ask the consumer for a fraud affidavit. How is a proper investigation for identity theft conducted without looking at the signature on the original credit card application to see if it was forged or not?

*Missing credit limits*

The deliberate withholding of credit limit information by credit card furnishers is a well-documented and extremely serious problem. The withholding of credit limit information has a considerable impact on the consumer's credit score, because the ratio of credit used to credit available often constitutes 30% of the score.[23] A Federal Reserve Board study indicates about that 46% of consumers have at least one revolving account in their credit files that does not contain information about the credit limit.[24]

One researcher has theorized that requiring the reporting of credit limits might even help in part to address one of the most vexing problems with respect to the use of credit scoring -- its apparent disparate impact on certain minority populations, as shown by study after study finding that African Americans and Latinos have lower credit scores as a group. The Brookings Institution has suggested that part of the reason for the racial divide in credit scoring may the failure of certain lenders to report complete information such as credit limits.[25]

*No Interest in Helping*

Finally, there is one more example that shows how uninterested the CRAs are in ensuring accuracy or responding to consumers. In 2005, several consumer groups attempted to assist survivors who were undergoing major economic disruption caused by Hurricane Katrina from suffering adverse consequences of credit scores that would be artificially depressed as a result of that disaster. Fair Isaac, the developer of scoring models, was willing to work with the consumer groups. However, because developing a scoring model adjustment for disasters would take some time, we approached each of the three nationwide CRAs with a simple request to retain on file a "pre-disaster information" credit score based on current information on consumers in the counties affected by Hurricane Katrina. Each of the nationwide CRAs flatly turned us down.[26]

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[22] King v. Asset Acceptance, 452 F.Supp.2d 1272 (N.D. Ga. 2006).
[23] Fair, Isaac, *What's In Your Score,* available at www.myfico.com/CreditEducation/WhatsInYourScore.aspx.
[24] Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin, Summer 2004, at 306.
[25] *See* Matt Fellowes, *Credit Scores, Reports, and Getting Ahead in America*, Brookings Institution, May 2006 at 10 (suggesting that failure to report complete information may affect the relationship between race and credit scores).
[26] Press Release, *Credit Reporting Agencies Reject an Important Step to Help Hurricane Survivors:*

## III. The Safety Net Is Broken: The Failure Of The Reinvestigation Process

The credit reporting industry has attempted to rebut charges of systemic inaccuracies in credit reports with their own studies, claiming that fewer than 3% of credit reports are inaccurate.[27] Even if the industry were correct, 3% of 200 million files[28] means that inaccurate credit reports are sabotaging the lives of 6 million Americans. These include Americans who work hard their entire lives, pay their bills on time, are responsible credit users, and otherwise play by the rules. Yet the credit reporting industry has the audacity to minimize the damage and disruption that inaccurate reporting wreaks on 6 million lives (or 50 million lives if one uses the 25% figure).

The FCRA does not impose strict liability for these inaccuracies - it requires CRAs to "follow reasonable procedures to assure maximum possible accuracy." 15 U.S.C. § 1681e(b). That is the first level of protection for accuracy in credit reporting. However, for those consumers who this first level of protection fails- whether it be 3% or 25% of the U.S. adult population- Congress enacted a second level of protection: the dispute process. The dispute process is the safety net when something goes wrong in the processing of billions of pieces of data for hundreds of millions of files. Unfortunately, the credit reporting industry has created gaping holes in that safety net.

The reinvestigation system in its current form is fundamentally flawed, and consumer advocates have stated so repeatedly in testimony to Congress and the regulatory agencies. As we discuss and the testimony of my fellow consumer advocates show, these flaws have not been addressed since the passage of FACTA. In fact, the FTC's August 2006 report on the dispute process similarly documents a lack of change in the reinvestigation process, but unfortunately treats the absence of reform as acceptable.

Two of the main problems with the credit reporting system's investigation process are: (1) the automated dispute system, in which CRAs convert detailed consumer disputes into cryptic two or three digit codes and do not forward to furnishers the documentation of errors that consumers send to the CRAs; and (2) furnishers' investigations of disputes involve merely verifying that the information matches their own computer records, without undertaking a meaningful examination of the underlying facts, with the CRAs accepting whatever the furnishers tell them without conducting an independent review. The continued result of this lackadaisical reinvestigation system is that consumers find it extremely difficult, frustrating, and expensive to dispute errors.

*Automation Creates Flawed Reinvestigations*

All too commonly, CRAs and furnishers fail to take complaints from consumers either seriously or seriously enough. Testimony and other evidence from cases suggest that CRAs

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*Many Katrina Victims Will Face Additional Economic Difficulties as Credit Scores Drop Due to Disaster*, Consumers Union et al., October 6, 2005.

[27] FTC 2004 Report at 25.

[28] FTC/FRB 2006 Report at 3.

receive tens of thousands of consumer disputes each week while imposing quotas for the number of consumer disputes that employees must process. CRA employees have testified that employees are required to process one dispute every four or six minutes in order to meet quotas.[29]

In order to crunch down the time for a consumer's dispute into a mere matter of minutes, CRAs have developed a highly automated, computer-driven system that precludes any meaningful reinvestigation. A consumer's dispute is communicated using a Consumer Dispute Verification form (CDV). An automated version of the form, communicated entirely electronically, is known as Automated Consumer Dispute Verification (ACDV). Furthermore, all three CRAs collaborated through CDIA to create an automated on-line reinvestigation processing system called "e-OSCAR." According to the CDIA, 83% of disputes are processed using e-OSCAR, and each of the three nationwide CRAs has announced plans to stop accepting paper-based disputes.[30]

This automated system is heavily dependent upon standardized dispute codes used to communicate the nature of the dispute. Approximately 80% of consumer disputes are written.[31] These written disputes often consist of a detailed letter with supporting documentation, painstakingly written by concerned and even desperate consumers. All of these documents, including a consumer's careful description of a specific dispute, fashioned to make detection and correction easy, are reduced to a two or three digit code that the CRA employee who glances at the material believes best describes the dispute.

The code is sent to the furnisher and is often communicated alone, without supporting documentation provided by the consumer - documents such as account applications, billing statements, letters, and payoff statements that can show overwhelming and even conclusive proof. These critical documents are left out of the reinvestigation process while both the CRA and furnishers rely instead on the automated dispute process and its coding of information. Disturbingly, the actual policies and practices of the CRAs are to *not* forward documents and other information to furnishers that would allow the furnisher to evaluate the accuracy and completeness of the disputed information.[32] The CRAs claim forwarding documents through e-OSCAR is "questionable," a difficult claim to believe given how easily documents can now be transmitted electronically via PDF files.

Thus, the automated dispute system deliberately violates the FCRA's requirement that the CRA include "all relevant information" about the dispute that the CRA received from the consumer. 15 U.S.C. § 1681i(2). And if all relevant communication is not forwarded, the furnisher cannot comply with the FCRA's requirement to "review all relevant information" provided by the CRA. 15 U.S.C. § 1681s-2(b)(1)(B). This essential requirement to review all relevant information has become a nullity because such information is never communicated.

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[29] *See* Cushman v. Trans Union Corp., 115 F.3d 220, 224-25 (3d Cir. 1997). *See also* Deposition of Regina Sorenson, Fleischer v. Trans Union, Civ. Action No. 02-71301 (E.D. Mich. Jan 9, 2002).
[30] FTC/FRB August 2006 report at 16.
[31] *See* Deposition of Eileen Little, Evantash v. G.E. Capital Mortgage, Civ. Action No. 02-CV-1188 (E.D. Pa. Jan. 25, 2003).
[32] FTC/FRB August 2006 Report at 18.

The use of this automated system also has contributed to the problem that some furnishers merely verify the existence of disputed information, and do not actually investigate disputes. In addition to failing to provide a meaningful description of the dispute and underlying documentation, this system permits a furnisher to simply check a box indicating that the disputed information has been verified, an exercise which aids and abets inadequate furnisher investigation. Once the disputed information is purportedly reinvestigated, the CRAs then send generic and uninformative letters stating that an investigation has been made, without including any details as to whom they have contacted and what information was obtained or relied upon for a final determination.

As you can imagine, numerous difficulties with this level of automation have been noted by consumer counsel. Even furnishers have complained that the dispute codes are "vague and overbroad."[33] As the Seventh Circuit noted about the ACDV processes:

> It seems that Experian has a systemic problem in its limited categorization of the inquiries it receives and its cryptic notices and responses. For example, there is the meaningless communication [plaintiff] received from Experian in response to her notice of dispute: "Using the information provided the following item was not found: Grossinger City Toyota." Another example is the opaque notice of dispute sent by Experian to U.S. Bank: "Claims Company Will Change or Delete." Moreover, in what appears to be an unresponsive form letter rather than the report of an adequate investigation into her claim, [plaintiff] was notified that the "Paid/Was a repossession" notation would remain in her report and the only change would be the addition of: "Account closed at consumer's request."[34]

*Inadequate Investigation*

Consumer advocates repeatedly confirm that CRAs and furnishers are simply not conducting meaningful reinvestigations. Instead, some furnishers default to verifying the existence of an account and the disputed information itself. They do not actually research the underlying dispute, review documents, or speak to consumers about the dispute. These furnishers simply verify information to the CRAs, who in turn "parrot" this verification without conducting an independent review.

For what should be done in an investigation, consider the testimony of Elizabeth Aadland, who once worked as a fraud investigator for the bank for Zales Jewelers. Ms. Aadland described how she conducted a fraud investigation for Zales, which included: [35]

- gathering original documents, including the credit application, the sales tickets, and any statements from the store personnel that were in written form;
- gathering copies of identification and police reports;

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[33] *Id.* at 17
[34] Ruffin-Thompkins v. Experian Info. Solutions, Inc., 422 F.3d 603, 610-611 (7th Cir. 2005).
[35] Deposition of Elizabeth Aadland, Smith v. Citifinancial Retail Services, No. 3:06-cv-02966 (N.D. Cal. March 23, 2007).

- examining the signature of the purchaser on the sales ticket and account application;
- interviewing store personnel, including the store manager, where possible, and the sales associate who had handled the actual transaction;
- preparing statements to be signed by store personnel or taking notes of interviews;
- interviewing the fraud victim because "often they would have additional information that would help us in locating a suspect or determining how the fraud or forgery had occurred."

Now contrast that with testimony by furnishers showing that they conduct FCRA investigations by merely comparing the information in the ACDV with their internal computer records. These include:

> **Capital One** - Capitol One employee Pamela Tuskey described how all three of the nationwide CRAs instructed Capital One personnel to simply verify information and to "make our system look like your system." The CRAs even discouraged the Capital One personnel from actively researching by pulling statements or similar activities.[36]
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> **MBNA** - In *Johnson v. MBNA*, the furnisher's employees testified that it was their practice to merely confirm the name and address of consumers in their computers and note from the applicable codes that the account actually belongs to the consumer, and that they *never* consult underlying documents such as account applications to determine accuracy of disputed information.[37]
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> **Asset Acceptance** - *King v. Asset Acceptance* describes how that debt buyer responds to an FCRA dispute by merely reviewing the account information provided in ACDV and comparing it to the information in Asset's files. Asset does not typically request account documents from the original creditor in its review of an ACDV. If the ACDV or the consumer indicates identity theft or fraud, Asset's sole additional response is to send the consumer a letter requesting that the consumer provide an identity theft report.[38]

As for CRAs, their main response to FCRA disputes is to "parrot" what the furnishers respond to them, even when a simple check would reveal inconsistent information. For example, *Allen v. Experian Information Systems* involved a Sears account that was being reported on the consumer's credit report as "included in bankruptcy" past the limitations period for that information. The consumer's bankruptcy had occurred in 1993, yet the Sears account was reported as included in bankruptcy in 1997. When asked why Experian investigators didn't address the consumer's dispute by cross-checking their own records or check the records of the United States Bankruptcy Court as to the correct date of the bankruptcy, Experian employee Kathy Centanni answered:[39]

> …the consumer is not disputing the bankruptcy. If they were disputing the bankruptcy as such, we would dispute the public record.

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[36] Deposition of Pamela Tuskey, Carol Fleischer v. Trans Union, Case No. CV 02-71301 (E.D. Mich.).
[37] Johnson v. MBNA, 357 F. 3d 426 (4$^{th}$ Cir. 2004).
[38] King v. Asset Acceptance, 452 F.Supp.2d 1272 (N.D. Ga. 2006).
[39] Deposition of Kathy Centanni, Allen v. Experian Information Solutions, Civ. No. 04-817 (S.D. Ill. Dec. 6, 2005).

> The consumer is disputing the information being reported by a creditor, and it's our responsibility to go back to that creditor for them to research it.

In other words, the CRA's policy is that what the furnisher says is gospel and even court records cannot contradict that. Another recent example of this practice of refusing to conduct an actual investigation and instead to parrot the furnisher is *Cairns v. GMAC Mortg. Corp*.,[40] in which Equifax argued that "by contacting GMAC regarding Mr. Cairns' dispute, it had complied with the statutory obligations regarding reinvestigation." Fortunately, the court disagreed that Equifax's sole responsibility in an investigation was to contact the furnisher.

Even when the consumer is successful in getting documents into the hands of CRAs or furnishers, advocates know from recurring cases that the standard response of CRAs and furnishers is to ignore the documentation. For example, CSC Credit Services, which is an Equifax affiliate, has explicitly stated its policy of not considering any payoff letter from a creditor over 90 days old.[41] In another case, a consumer disputed information in her Equifax credit report, which the furnisher simply confirmed, even though the consumer had already won a court decision that she did not owe the debt. When the consumer again disputed the entry with Equifax, the furnisher again confirmed the debt, plus it increased the amount owed from $488.00 to $829.00.[42]

All of these examples show that furnisher reinvestigations consist primarily of checking information in their computer data, while CRAs do even less by simply parroting the results supplied by the furnisher. Checking information against computer records is not an investigation of whether information is accurate; it is simply verification of files. That is NOT the standard in the FCRA.

## IV. Why the CRAs and Furnishers Ignore Their Duties Under the FCRA

*Disagreement Over "Accuracy"*

The term accuracy is not defined in the FCRA, but it is a critical concept in the statute. While one would think there would be no reason to disagree over what constitutes "accuracy," the matter is not so simple. For years, CRAs and furnishers have used a different standard of accuracy. They have treated a piece of information as accurate if it matches the data in their records. This is not enough. Accuracy is not simply "Conformity to data records." It is conformity to truth, to the objective reality of what is correct.

This definitional controversy over "accuracy" is part of the reason why CRAs and furnishers have not conducted real investigations, but simply considered information accurate if they could verify it against their computer records.

*Money Talks, Everything Else Walks*

[40] 2007 WL 735564 (D. Ariz. March 5, 2007).
[41] McKinley v. CSC Credit Serv., 2007 WL 1412555 (D. Minn. May 10, 2007).
[42] Betts v. Equifax Credit Information Services, 245 F. Supp. 2d 1130 (W.D. Wa. 2003).

The primary reason that the CRAs and furnishers fail to conduct proper reinvestigations under the FCRA is simple: money. The CRAs and furnishers treat disputes as nuisances and devote correspondingly little effort to them, because there is little economic incentive to conduct true reinvestigations. A real investigation would cost the CRAs and furnishers real money. For the CRAs, this is money spent on people who are not their real customers, except for the handful that might buy "credit monitoring products" (far outweighed by what the furnishers/subscribers pay).

The risk of an occasional lawsuit appears not to have overcome these economic incentives. The result is persistent inaccuracies in credit reports, which harms both consumers and creditors. Until the failure to conduct a real investigation becomes more expensive than not conducting a real investigation, the current system will remain broken. Furthermore, any protections for identity theft victims cannot be effective in the absence of a real investigation.

## V. Role of the Federal Trade Commission and Banking Regulators

Vigorous enforcement is critical in the credit reporting realm, even more so than in many other areas of consumer protection. There are many sections of the FCRA that are only enforceable by the FTC or by the banking regulators, including:

- Accuracy requirements for furnishers under 15 U.S.C. § 1681s-2(a)(1);
- Consumer's right to dispute debt directly to furnisher under 1681s-2(a)(8);
- Identity theft victim's right to identity theft transaction information under 1681g(e);
- Red flag guidelines under 1681m(e);
- Risk based pricing notices under 1681m(h)(8) (and potentially all FCRA notices);
- Furnisher's response to an identity theft victim under 1681s-2(a)(6);
- Notice of furnishing of negative information under 1681s-2(a)(7); and
- Accuracy and integrity guidelines under 1681s-2(e).

The primary job of enforcement lies with the FTC. The FTC has brought several FCRA enforcement actions in the past decade, many against non-bank furnishers and users of credit information. However, the FTC has only brought a handful of cases during this decade against the nationwide CRAs, and apparently none of which involved the accuracy of information. More critically, the FTC has failed to be assertive in its role as the administrative agency which interprets the FCRA and issues rules.

For example, the FTC has failed to recommend several proposals to improve credit reporting accuracy that FACTA required the agency to study, such as:[43]

- requiring the CRAs to institute stricter matching criteria to prevent mixed files, such as requiring complete SSN matches.
- providing consumers who have experienced adverse actions based on a credit report the right to receive a copy of the same report that the creditor relied upon.

[43] FTC 2004 Report at 53-55, 66-67.

Another example of an inadequate response is the FTC's decision not to address the CRAs' failure to forward consumer's documentation to furnishers during the dispute process. Despite the FCRA's unqualified requirement that the CRAs provide "all relevant information," the FTC and FRB concluded that the CRAs' failure did not necessarily violate the Act.

At least the FTC has taken some enforcement actions under the FCRA. We do not know of any FCRA enforcement actions that federal banking agencies have taken with respect to banks under their supervision. If there have been any such actions, they have not been publicized. The banking regulators are the sole entities capable of enforcing the accuracy requirements of the FCRA against bank furnishers under 15 U.S.C. § 1681s-2(a). They have abdicated this responsibility, leaving consumers unprotected against inaccurate and even deliberate misreporting by bank furnishers.

Finally, all of the regulators are also extremely tardy in issuing guidelines required by Section 312 of FACTA to enhance accuracy by furnishers. The FTC and banking regulators have only issued an Advanced Notice of Proposed Rulemaking, to which we submitted comments in response in May 2006 and are attached as Appendix 1.

## VI. What Consumers Need In Order to Protect Their Rights

*"Fix That Report"*

The number one right that consumers lack under the FCRA is the ability to ask a judge to tell the CRAs and furnishers: "fix that report." With one minor exception, the FCRA does not provide for declaratory or injunctive relief in actions by private parties. The vast majority of courts have held that courts do not have the power to issue an injunction under the FCRA. The FCRA is an anomaly in this respect, as the Supreme Court decision in *Califano v. Yamasaki* provides the basis for injunctive relief for most other laws.[44]

Consider a consumer who has filed dispute after dispute with the CRAs, who has supplied evidence of fraud or mistake, and who has sued to protect her rights under the FCRA. If she can show that the CRAs or furnishers were unreasonable in their investigations, she might be able to get actual damages if she can prove the error caused a denial of credit after the dispute or is in a jurisdiction that permits intangible damages. If she can show the CRAs or furnishers knew they were violating the law or acted with reckless disregard, she can seek statutory or punitive damages. But she cannot seek the one thing she really wants, the remedy that started her down this arduous path in the first place - an order telling the CRAs and furnisher to correct the error.

Providing courts with explicit authority to issue injunctive relief would further the purpose of the FCRA to "assure maximum possible accuracy." Courts should be granted the explicit authority to order CRAs and furnishers to delete inaccurate information and cease issuing reports that contain such inaccuracies. Judicial efficiency would also be served since

[44] 442 U.S. 682 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.")

consumers would not be compelled to file multiple suits when CRAs repeatedly include inaccuracies or fail to comply with the FCRA's requirements.

The FCRA currently protects creditors and other furnishers from all liability for furnishing inaccurate information -- even if the consumer has repeatedly informed the creditor of errors, or the information is blatantly wrong, or even if the information is furnished spitefully. We propose that consumers be granted the limited right to correct inaccuracies by obtaining injunctive and declaratory relief against furnishers. In this initial process, consumers seeking injunctive and declaratory relief would not be entitled to monetary damages, only the reasonable attorney's fees incurred for successfully obtaining injunctive or declaratory relief.

*Correcting a Scrivener's Error*

FACTA inadvertently created ambiguity about whether consumers may enforce the FCRA requirement that creditors give notice to consumers when an "adverse action" is taken, *i.e.*, credit or insurance is denied or provided on less favorable terms, on the basis of an unfavorable credit report. 15 U.S.C. § 1681m. FACTA was intended to limit the remedies for the new risk-based pricing notice, but not to change the enforceability of existing FCRA notice requirements. 15 U.S.C. § 1681m(h)(8). However, the phrase "this section" in the limiting provision has been interpreted by several courts to apply to the pre-existing adverse action requirements, making the entirety of 15 U.S.C. § 1681m unenforceable under the FCRA private right of action.[45] This scrivener's error should be fixed by changing "this section" in § 1681m(h)(8) to "this subsection."

*Recommendations to the Regulators*

In addition to our legislative proposals, we have made a number of recommendations to the FTC and banking regulators as to what these regulators should require. If the regulators refuse to adopt these measures, Congress should do so. Some of our recommendations are set forth below, and the entire text of our comments is attached as Appendix 1.

- Original creditors must be required to retain the operative records for any account for which they are reporting a tradeline. These documents would include the original account applications, original contract or agreements, any billing statements, any contract modifications or forbearance agreements, any records of disputes, and for real estate secured loans, the settlement package.
- Debt collectors and debt buyers must be required to obtain the original records needed to verify a debt from the creditor and to review them before furnishing information to a CRA. For example, in a credit card case, the debt buyer must be required to obtain and review the consumer's account application, original agreement, history of periodic statements, and any record showing whether any of the debt was disputed with the creditor. At a minimum, if the consumer disputes the debt and the debt buyer does not have adequate original documentation, the tradeline must be deleted from the consumer's file.

[45] Perry v. First Nat. Bank, 459 F.3d 816 (7th Cir. 2006) (collecting cases).

- CRAs must be required to convey to furnishers the actual documents that support the consumer's dispute, and failure to do so should be *per se* unreasonable.
- Furnishers must be required to investigate the specific dispute raised by the consumer rather than merely verifying that the disputed information itself appears in their own records. At a minimum, the furnisher's reinvestigation must involve reviewing the actual documents provided by the consumer. Depending on the nature of the dispute, the furnisher may also have to review documents in its own possession or in the possession of an earlier holder of the debt, and may have to contact third parties. In short, the reinvestigation must make a substantive determination of the validity of the specific dispute at issue.
- Furnishers should be required to rebut the consumer's specific disputes by providing to the consumer and the CRA documentation that shows that the information furnished is correct. Furnishers should not be allowed simply to tell the CRA that the consumer is wrong and the original information was correct, and CRAs should not be allowed to accept such a report. Instead, the furnisher should be required to give the consumer and the CRA the underlying information - copies of documents with original signatures to rebut a forgery claim, for example, or copies of the payment record to demonstrate that the claimed balance is correct.
- The CRA must be required to review and evaluate the response from the furnisher, rather than merely parroting it.
- The CRAs should be required to set up an appeal procedure that the consumer can invoke, that involves a telephone conference with a CRA employee who has the consumer's dispute and all the documentation provided by the furnisher and the consumer.

**VII. Conclusion**

Three and a half years after FACTA, the American credit reporting system continues to be plagued by errors, and its safety net mechanism to correct those errors is broken. The CRAs have the ability to address these errors by revising their systems, but have chosen not to do so. Instead, they have created an automated and perfunctory dispute processing system, substituting computer codes and automated processing for real, meaningful investigations. Some furnishers participate in this perfunctory system by conducting investigations that consist of nothing more than comparing computer records to the notice of dispute. CRAs have little incentive to improve their procedures or investigations, because improvements cost money and only benefit consumers, who are not their real customers.

The credit reporting industry will only improve if Congress or the regulators take action. They will only improve if forced to do so by a court, yet consumers cannot even ask a court to issue injunctive orders. Without these measures, consumers will continue to be victimized by credit reporting errors and will be unable to use the rights granted to them by Congress to fix those errors.

Thank you for the opportunity to testify today.

# APPENDIX 1

**COMMENTS**
**of the National Consumer Law Center**
**(on behalf of its low-income clients)**

**and**

**Consumer Federation of America**
**Consumers Union**
**National Association of Consumer Advocates**
**U.S. Public Interest Research Group**

**to the**
**Office of the Comptroller of the Currency**
**12 CFR Part 41**
**Docket No. 06-04**

**Office of Thrift Supervision**
**12 CFR 571**
**No. 2006-06**

**Federal Reserve System**
**12 CFR 222**
**Docket No. R-1250**

**Federal Deposit Insurance Corporation**
**12 CFR 334**
**RIN 3064-AC99**

**National Credit Union Administration**
**12 CFR 717**

**Federal Trade Commission**
**16 CFR Parts 660 and 661**
**RIN 3084-AA94**

**Advanced Notice of Proposed Rulemaking: Furnisher Accuracy Guidelines and Procedures Pursuant to Section 312 of the Fair and Accurate Credit Transactions Act**

The National Consumer Law Center ("NCLC")[1] submits the following comments on behalf of its low income clients, as well as the Consumer Federation of America,[2] Consumers

[1]**The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit

Union,[3] National Association of Consumer Advocates,[4] and the U.S. Public Interest Research Group[5] regarding the Interagency Advance Notice of Proposed Rulemaking concerning procedures to enhance the accuracy and integrity of information furnished to consumer reporting agencies ("CRAs").[6] The Fair and Accurate Credit Transactions Act of 2003 required the federal banking regulatory agencies and the Federal Trade Commission ("Regulatory Agencies") to issue guidelines regarding furnisher accuracy and integrity as well as regulations governing when furnishers are required to investigate direct disputes from consumers.[7]

## I. PRELIMINARY DEFINITIONAL ISSUES: WHAT IS "ACCURACY"?

One of the fundamental issues that the Regulatory Agencies will need to address is what constitutes "accuracy." There are a number of definitional issues, which are discussed below.

### a. <u>"Accuracy" Should Be Defined to Mean that Information is Factually Correct in the Real World.</u>

The term accuracy is not defined in the FCRA, but it is a critical concept in the statute. While one would think there would be no reason to disagree over what constitutes "accuracy", the matter is not so simple. The Regulatory Agencies must address this issue and define "accuracy" as information that is objectively true.

For years, furnishers have used a different standard of accuracy. They have treated a piece of information as accurate if it matches the data in their records. This is not enough. Accuracy is not simply "Conformity to data records." It is conformity to truth, to the objective

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transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (5th ed. 2002) and *Credit Discrimination* (3rd ed. 2002) are two of the eighteen practice treatises that NCLC publishes and annually supplements. These comments were written by Chi Chi Wu, Staff Attorney, with the assistance of Richard Rubin, Gail Hillebrand, Travis Plunkett, Ian Lyngklip, Evan Hendricks, Robert Hobbs, and Carolyn Carter. They are submitted on behalf of the Center's low-income clients.

[2] The **Consumer Federation of America** is a nonprofit association of some 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

[3] **Consumers Union**, the nonprofit publisher of Consumer Reports magazine, is an organization created to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications. And noncommercial contributions, grants and fees. Consumers Union's publications carry no advertising and receive no commercial support.

[4] The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

[5] **U.S. PIRG** serves as the federal lobbying office for the state Public Interest Research Groups, which are non-profit, non-partisan public interest advocacy organizations.

[6] 71 Fed. Reg.14419 (March 22, 2006).

[7] Pub. L. No. 108-159, 117 Stat. 1952, § 312 (2003).

reality of what is correct. For example, the first entry in the American Heritage dictionary defines accuracy as: "Conformity to fact"[8]

This controversy over "accuracy" has manifested itself most often in the area of disputes, discussed further in our Response to A.8. Furnishers have not conducted real investigations, but simply considered information accurate if they could verify it against their computer records. For example, in the notable case of Johnson v. MBNA, employees of a major credit card issuer testified that "in investigating consumer disputes generally, they do not look beyond the information contained in the [MBNA computerized Customer Information System] and never consult underlying documents such as account applications."[9]

As the jury found in Johnson, and other courts have held,[10] this method of ensuring accuracy is entirely unacceptable. The Regulatory Agencies should issue guidelines stating the same.

b. <u>"Accuracy" Must Consider The Issue Of Credit Scoring.</u>

Any test of accuracy must be considered in context of credit scoring. What may seem to be a minor issue standing alone may create enormous inaccuracies with respect to credit scoring. For example, the failure to report a credit limit by itself is a slight omission, except for the fact that Fair Isaac's credit score models base 30% of a credit score on the ratio of credit used to credit available.[11] Thus the failure to report a credit limit can significantly depress a credit score (see Response to A.1 below).

Another example where credit scoring matters is when a furnisher deletes a tradeline instead of correcting inaccurate adverse information. Not only does the deletion make the consumer report incomplete, which makes it inaccurate, such a deletion may have a tremendous impact on a credit score. The tradeline could be worth significant additional "points" in a credit score if properly corrected, if for example, it is the oldest account in the consumer's file or it affects the consumer's utilization ratio.

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[8] The American Heritage Dictionary of the English Language, (4th Ed. 2000). The first entry in the Merriam-Webster Online Dictionary is similar - "freedom from mistake or error." Available at http://www.m-w.com/dictionary/accuracy

[9] Johnson v. MBNA Am. Bank, NA, 357 F.3d 426 (4th Cir. 2004).

[10] Cushman v. Trans Union Corp., 115 F.3d 220, 224-25 (3d Cir. 1997) (perfunctory investigation improper once a claimed inaccuracy is pinpointed); Henson v. CSC Credit Services, 29 F.3d 280, 286-87 (7th Cir. 1994) (must verify accuracy of initial information); Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1160 (11th Cir. 1991) (whether error could have been remedied by uncovering additional facts); Dynes v. TRW Credit Data, 652 F.2d 35-36 (9th Cir. 1981)(single effort to investigate inadequate); Bryant v. TRW, Inc., 689 F.2d 72, 79 (6th Cir. 1982) (two phone calls to the creditors insufficient; Swoager v. Credit Bureau, 608 F. Supp. 972, 976 (D.C. Fla. 1985) (merely reporting whatever information a creditor furnished not reasonable; *In re* MIB, Inc., 101 FTC 415, 423 (1983) (FTC ordered the CRA to include as part of such reinvestigation a reasonable effort to contact original sources); *In re* Credit Data Northwest, 86 FTC 389, 396 (1975) (FTC ordered a credit reporting agency to "request[] examination by the creditor, where relevant, of any original documentation relating to the dispute in addition to its own records). These cases predate the 1996 amendments to the FCRA.

[11] Fair, Isaac, *What's In Your Score,* available at www.myfico.com/CreditEducation/WhatsInYourScore.aspx.

c. Technical Accuracy is Not "Accurate": Information Must Be Complete and Non-Misleading

A third key definitional issue is whether information can be considered "accurate" if it is technically true in some narrow sense, but is overly general, incomplete, out of date, or misleading. We believe that technical accuracy is not enough; a report should not be misleading or incomplete, even if true in the narrowest sense.[12] This standard for accuracy is not *sui generis*. The omission of a material fact constitutes misrepresentation under common law and deception under the Federal Trade Commission Act.[13] This view is also supported by the FTC in its Commentary and other interpretations.[14]

"Technically accurate" but misleading or incomplete reports have the potential to wreak great havoc on consumers and the integrity of the credit reporting system. For example, a report might be technically accurate if it stated that a debt was turned over to a collection agency, but neglected to include that the debt was subsequently fully paid.[15] It might be technically accurate if it reported a suit against an individual, but omitted that the individual was sued in his official capacity as deputy sheriff.[16] Even if "technically accurate" and complete, a report still will be inaccurate when it is misleading or ambiguous in view of the jargon or understanding within the community or industry of its intended users.[17] Each of these reports is not truly accurate because it misleads the reader or omits critical information.

A review of the congressional history provides clear support that the FCRA has never contemplated a "technically accurate" standard. Consider, for example, an exchange between Senator Bennett, the industry spokesman in debates, and Senator Proxmire, the drafter of the Act:

> **Sen. Bennett**: "It doesn't take any judgment in the end to discover whether or not something is accurate in terms of treatment."
> **Sen. Proxmire**: "Well, here is a situation that has developed. One man's file had the charge in it that he had suffered a charge of assault. This was in the file. The information was not in the file that the charge had been dismissed because under the

[12] *See, e.g.,* Dalton v. Capital Associated Industries, 257 F.3d 409, 415-16 (4th Cir. 2001); Sepulvado v. CSC Credit Services, 158 F.3d 890, 895 (5th Cir.1998); Henson v. CSC Credit Services, 29 F.3d 280 (7th Cir. 1994); Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987); Koropoulos v. Credit Bureau, Inc., 734 F.2d 37 (D.C. Cir. 1984); Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509 (5th Cir. 1982); Neal v. CSC Credit Services, Inc., 2004 WL 628214 (D. Neb. Mar. 30, 2004) (Wilson turns on warning that information might be inaccurate); Agosta v. Inovision, Inc., 2003 WL 22999213 (E.D. Pa. Dec. 16, 2003) (misleading or materially incomplete entry is inaccurate). Curtis v. Trans Union, L.L.C., 2002 WL 31748838 (N.D. Ill. Dec. 9, 2002); Alexander v. Moore & Assoc., 553 F. Supp. 948 (D. Haw. 1982) (technical accuracy is not the standard; a consumer report must be accurate to the maximum possible extent); Bryant v. TRW, Inc., 487 F. Supp. 1234 (E.D. Mich. 1980), *aff'd*, 689 F.2d 72 (6th Cir. 1982); Tracy v. Credit Bureau, Inc. of Georgia, 330 S.E.2d 921 (Ga. Ct. App. 1985). *See also* Wilson v. Rental Research Serv., Inc., 165 F.3d 642 (8th Cir. 1999), *rehearing en banc without published opinion*, 206 F.3d 810 (8th Cir. 2000) (by vote of an equally divided court, the district court's order is affirmed) (case involved disclaimers placed in consumer reports).
[13] 15 U.S.C. § 45; National Consumer Law Center, Unfair and Deceptive Acts and Practices § 4.2 (6th ed. 2004).
[14] FTC Official Staff Commentary §§ 607 items 3F(1), (2), (3), 611 items 5, 6.
[15] Todd v. Associated Credit Bureau Services, Inc., 451 F. Supp. 447 (E.D. Pa. 1977), *aff'd*, 578 F.2d 1376 (3d Cir. 1979), *cert. denied*, 439 U.S. 1068 (1979).
[16] Austin v. Bankamerica Service Corp., 419 F. Supp. 730 (N.D. Ga. 1974).
[17] Cassara v. DAC Services, Inc., 276 F.3d 1210 (10th Cir. 2002).

circumstances what had happened was that he had witnessed the mugging of an elderly person in the dark in the street and had gone to the elderly person's defense and in the course of doing this he had to assault the person who was mugging the elderly person. He was a hero. The person who had engaged in the mugging sued him for assault. Of course, it was dismissed.

You can have a report which is accurate but not complete and not fair. I think this is one of the reasons why you have to go a little further than simple accuracy."

**Sen. Bennett**: "I don't think a report that is that incomplete can be said to be accurate. But now we are talking about words."[18]

In the alternative, the Regulatory Agencies should issue guidelines that information lacks "integrity" if it is only technically accurate but omits critical information. The integrity of the credit reporting system depends on information that does not mislead the reader.

Further discussion of the problems of incomplete consumer reports is discussed in the Response to A.1 below.

## II. RESPONSES TO SPECIFIC QUESTIONS IN THE REGULATORY AGENCIES' REQUEST FOR INFORMATION

Below are specific responses to some of the Regulatory Agencies' request for information

A1. *Please describe, in detail, the types of errors, omissions, or other problems that may impair the accuracy and integrity of information furnished to consumer reporting agencies. . . .*

### Out of date information[19]

One of the most frequent errors is the "re-aging" of old debts by debt collection agencies and debt buyers, in which these furnishers report the date of last activity as a date later than what is legally permitted under the FCRA. There are numerous reported cases involving debt buyers and collectors re-aging debts,[20] including two major enforcement actions by the Federal Trade Commission.[21]

[18] *Hearings on S. 823, Subcommittee on Financial Institutions on the Senate Banking and Currency Committee 91st Cong., 1st Sess. 34 (1969)*.

[19] The comments of Evan Hendricks contain additional information regarding this issue and we refer the Agencies to those comments.

[20] Rosenberg v. Cavalry Investments, LLC, 2005 WL 2490353 (D. Conn. Sept. 30, 2005) (re-aging of a decades-old debt by debt buyer; summary judgment denied to debt buyer on FDCPA and FCRA claims); Thomas v. NCO Financial Systems, 2002 WL 1773035 (E.D. Pa. July 31, 2002) (approval of settlement involving FDCPA claims for re-aging). *See also* United States v. Gallant, 2006 WL 278554 (D. Colo. Feb. 3, 2006) (criminal case where defendant re-aged entire portfolio); Gillespie v. Equifax Information Services, 2006 WL 681059 (N.D. Ill. March 9m 2006) (example of re-aging case, summary judgment for CRA because obsolete information was never disclosed in a consumer report)

[21] United States v. Performance Capital Management (Bankr. C.D. Cal 2000) (complaint), available at www.ftc.gov/opa/2000/08/performance.htm; United States. v. NCO Group, Inc., 2004 WL 1103323 (E.D. Pa. 2004) (consent decree requiring monitoring of FCRA complaints, particularly regarding delinquency date).

Debt buyers and collectors "re-age" debt by placing an incorrect "date of last activity" in the relevant field (Base Segment, Field 25) in the Metro 2 format. This field is extremely important as it sets the date for calculating the start of the obsolescence period under section 1681c of the FCRA. This date is supposed to be the date of first delinquency, i.e., 180 days after charge off or placement for collection. The Credit Reporting Resource Guide ("Metro 2 Manual") states *repeatedly* that this date of first delinquency of the debt is the operative date.[22] This is true regardless whether the debt was sold to subsequent entities. The date is also unaffected by subsequent repayment arrangements. When a buyer of bad debt purchases an account, the original owner should zero out the "current balance" field and inform the purchaser of the debt the date the account first became delinquent.[23]

Despite the clear directions of the Metro 2 manual, debt buyers and collectors are all too likely to report the date of first delinquency as the date of their acquisition of the debt and not, as required, the first delinquency experienced by the original creditor. This failure to comply with the Metro 2 industry standard effectively (and illegally) extends the FCRA obsolescence period. This error -- one that we have found is regularly committed intentionally[24] -- is economically beneficial to the collector because it causes the debt to be reported well beyond the time it is legally obsolete, thus illustrating the truism that reporting a debt to a CRA is "a powerful tool designed, in part, to wrench compliance with payment terms….[and] to tighten the screws on a non-paying customer."[25]

**Omission of credit limits** [26]

The deliberate withholding of credit limit information by credit card furnishers is an extremely serious and widespread problem, as the Regulatory Agencies well know. One Federal Reserve Board study indicates about 70% of consumers have at least one revolving account in their credit files that does not contain information about the credit limit.[27] A later study by the FRB found that the percentage of consumers whose credit files had missing credit limit information had declined to 46%, due to efforts to encourage reporting of credit limits.[28] Still, nearly half of all consumers, and 14% of all credit card accounts remain affected by the practice.

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[22] Credit Reporting Resources Guide, *Consumer Data Industry Association* (2003), at 4-17,10-4 (hereinafter "Metro 2 Manual").
[23] *Id.* at 6-8.
[24] Of course, intentionality is not and never should be required to show an FCRA violation. Willful and negligent inaccuracy is just as harmful for consumers.
[25] Rivera v. Bank One, 145 F.R.D. 614, 623 (D.P.R. 1993); *accord*, Matter of Sommersdorf, 139 B.R. 700, 701 (Bankr. S.D. Ohio 1991); Ditty v. CheckRite, Ltd., Inc., 973 F.Supp. 1320, 1331 (D. Utah 1997); Sullivan v. Equifax, Inc., 2002 WL 799856, * 4 (E.D.Pa.).
[26] The comments of Evan Hendricks contain additional information regarding this issue and we refer the Agencies to those comments.
[27] Robert Avery, Paul Calem, Glenn Canner, and Raphael Bostic, *An Overview of Consumer Data and Credit Reporting*, Federal Reserve Bulletin, February 2003, at 71. *See also* Federal Financial Institutions Examination Council, *Advisory Letter*, January 18, 2000 (stating that "certain large credit card issuers are no longer reporting customer credit lines of high credit balances or both."), available at www.ffiec.gov/press/pr011800a.htm (last viewed July 2003).
[28] Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin, Summer 2004, at 306.

Furthermore, the latter study found that over 60% of these consumers would have experienced an increase in their credit score if the credit card issuer had not withheld the credit limit information.

The withholding of credit limit information has a considerable impact on the consumer's credit score. Fair Isaac states that, for its scoring models, the ratio of credit used to credit available accounts for 30% of an individual's score.[29]

It appears that credit card issuers not only deliberately withhold credit limit information, they do so to maximize their profit at the expense of the consumers and the integrity of the credit reporting system. One major credit card issuer has admitted that it deliberately failed to report credit limits of its customers as a way to artificially depress credit scores, citing "competitive advantage."[30] The Regulatory Agencies should promulgate guidelines that specifically prohibit withholding of credit limits by credit card furnishers.

One researcher has theorized that requiring the reporting of credit limits might even help in part to address the one of the most vexing problems with respect to the use of credit scoring -- its apparent disparate impact on certain minority populations, as shown by study after study finding that African Americans and Latinos have lower credit scores as a group.[31] The Brookings Institution has speculated that part of the reason for the racial divide in credit scoring may the failure of certain lenders to report complete information such as credit limits.[32]

**Incomplete Files**

As discussed above, an accurate consumer report is one that at a minimum has complete information. Yet a significant problem with credit reports is that they are frequently incomplete, in that they do not paint a complete picture of a consumer's credit record and other history. First of course, we know a consumer's files usually does not include information from non-subscriber creditors, such as landlords, where the consumer's regular payments would reflect positively on the consumer's overall creditworthiness.

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[29] Fair, Isaac, *What's In Your Score,* available at www.myfico.com/CreditEducation/WhatsInYourScore.aspx.

[30] Kenneth Harney, *Credit Card Limits Often Unreported*, Washington Post, December 25, 2004; Michele Heller, *FCRA Hearing to Shine Spotlight on Credit Reports*, American Banker, June 12, 2003, at 10.

[31] The most recent study is from the Brookings Institution, which found that "[c]ounties with relatively high proportions of racial and ethnic minorities are more likely to have lower average credit scores." Matt Fellowes, *Credit Scores, Reports, and Getting Ahead in America*, Brookings Institution, May 2006 at 9. Studies of insurance credit scores, which have not relied on geographic location as proxies for race, have produced similar findings. Texas Department of Insurance, *Report to the 79th Legislature - Use of Credit Information by Insurers in Texas*, December 30, 2004; Brent Kabler, *Insurance-Based Credit Scores: Impact on Minority and Low Income Populations in Missouri*, Missouri Department of Insurance – Statistics Section, January 2004. For other studies showing the correlation between race and credit scores, *see* Raphael W. Bostic, Paul S. Calem, and Susan M. Wachter, *Hitting the Wall: Credit as an Impediment to Homeownership*, Joint Center for Housing Studies of Harvard University, February 2004; Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin, Summer 2004, at 313 (Table 2); Freddie Mac, *Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America's Families*, September 1996, at 27.

[32] *See* Matt Fellowes, *Credit Scores, Reports, and Getting Ahead in America*, Brookings Institution, May 2006 at 10 (suggesting that failure to report complete information may affect the relationship between race and credit scores).

More troubling for consumers is the inclusion of information concerning preliminary actions that reflect negatively on the consumer without any follow up as to an eventual outcome that is more favorable to the consumer. For example, an auto lender may report that it has charged off a car loan on a car that has been totaled without reporting that the consumer continued to pay the note on time. A lease company might report that a lessee had gone through bankruptcy without noting that the lessee continued to be current on the car lease despite the bankruptcy. A Federal Reserve Board study has noted the problem with incomplete or out-of-date information. In particular, the study found that furnishers sometimes do not report or update information on consumers who consistently make their required payments or on consumers who have been seriously delinquent, particularly accounts with no change in status.[33] Incomplete files can be highly misleading.

Another sort of incomplete file develops when furnishers selectively withhold good payment histories from the CRAs. As both the Regulatory Agencies and the CRAs are aware, certain furnishers who wanted to keep their most reliable customers have purposefully withheld payment data to shield those customers from competing lenders who might seek to recruit them. This practice, which is common among subprime lenders, will result in credit reports that do not accurately reflect the positive payment histories for borrowers, especially high-interest borrowers in the subprime market. This practice distorts the credit market, trapping borrowers who are now good credit risks in the subprime arena.

Information also differs from CRA to CRA. According to the FRB report, CRAs all have their own rules for determining whether identifying information is sufficient to link information to a single individual, which sometimes results in "fragmentary files" that are multiple and incomplete credit reports for the same individual. CRAs also receive and post information at different times; furnishers may report to one or two CRAs, but not all three; and changes made to disputed information may be reflected in only the CRA that received the dispute and not the others.

The discrepancies that exist in the underlying information held and reported by CRAs have serious negative consequences for many Americans. A study of credit scores for more than half a million consumers by the Consumer Federation of America found that nearly one out of three files (29 percent) had a score discrepancy between the three biggest CRAs of 50 points or more. The study found that these differences put approximately 40 million consumers, or one in five, at risk of misclassification into the subprime mortgage lending market. Roughly eight million consumers, or one in five of those who are at risk – are likely to be misclassified as sub-prime upon applying for a mortgage.[34]

Incomplete information that is not related to any particular item in a file, but that would make the whole file more complete, is itself a troubling type of inaccuracy. The Regulatory

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[33] Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin, Summer 2004, at 301, *available at* www.federalreserve.gov/pubs/bulletin/2004/summer04_credit.pdf.

[34] *Credit Score Accuracy and Implications for Consumers*, Consumer Federation of America, December 17, 2002.

Agencies should encourage entities that are already furnishers to furnish information on all their customers.[35]

The failure of a furnisher to add information to items already in the file to make them accurate is a different kind of incompleteness. This problem should be specifically addressed by the Regulatory Agencies' accuracy and integrity guidelines. There should be no question that furnishers must have an obligation to add information to already preexisting items if the failure to do so would render the item misleading.

**Duplication in tradelines**

Debts that are sold or transferred to others for collection present another fundamental accuracy problem - duplicate accounts. This problem is especially acute with student loan and collection accounts. Generally speaking, the Metro 2 system relies upon the transferring creditor to delete the accounts from agency files and the new creditor or servicing agent to begin furnishing information about the account. A servicer, one who does not itself hold the note, must also continue to use the identification number of the holder. Mistakes when accounts are transferred can result in false or misleading information in consumer reports. Specifically, because credit grantors expect from the Metro 2 industry standard that tradelines will not be duplicated, errors such as these that falsely appear to multiply the amount of outstanding debt have harmful adverse impacts on consumers as well as on the credit grantors who lose otherwise qualifying loans on the mistaken belief that the consumer is overextended.

Note that the Metro 2 Manual states:

36. Question: What causes duplicate tradelines?
Answer: Any change in Account Number, Identification Number, Portfolio Type, and/or Date Opened may cause duplication if the consumer reporting agencies are not notified prior to the change.[36]

As one can imagine, these pieces of information often change when an account is transferred. For example, the plaintiff in Jordan v. Equifax had successfully gotten a student loan tradeline resulting from identity theft deleted from his file. The servicer then transferred the account to its affiliate, Sallie Mae, which assigned it a new account number. The fraudulent loan then began reappearing again due to the simple act of changing the account number.[37]

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[35] Requiring furnishers to report missing positive tradelines or information is not a radical concept. The Agencies themselves have previously disapproved of the practice of withholding good credit information. Fed. Fin. Insts. Examination Council, *Advisory Letter* (Jan. 18, 2001), available at www.ffiec.gov/press/pr011800a.htm. The former Comptroller of Currency has suggested that legislation might be a possibility to ensure that such information is reported and consumers are protected from such incomplete reporting. Office of the Comptroller of the Currency, *Press Release NR99-51*, June 6, 1999, available at www.occ.treas.gov/ftp/release/99-51.wpw. Freddie Mac has reminded its sellers and servicers that its Single-Family Seller/Servicer Guide requires monthly submission to all three credit repositories of a complete file of mortgage information. Freddie Mac, *Industry Letter* (Feb. 22, 2000).

[36] Metro 2 Manual at 6-12.

[37] Jordan v. Equifax Information Services, LLC, 410 F.Supp.2d 1349 (N.D. Ga. 2006).

Another example in the student loan context are status code 88 cases, which have been referred to the Department of Education for payment of the insured balance on the loan. If the claim is denied, the lender or servicer must delete the account and furnish afresh information about the debt, using the original date opened, status, and other attributes. If the lender or servicer does not report this correctly, an error may result in the same student loan debt being reported twice.

In the mortgage context, duplicate tradelines often appear when the servicing for a loan is transferred. According to the FRB study from 2004, closed mortgage accounts comprised a significant portion of the "stale accounts" in credit reports.[38]

**Incorrect Status Codes**

The Metro 2 format allows the furnisher to provide the current status of the reported account based on a series of standardized codes. There are many codes that can be reported generally to reflect the account status. Many furnishers' data entry employees are not well trained in the variety of entries that can be made and therefore use an inapplicable code that incorrectly describes the consumer's precise circumstances. For instance, a vehicle may have been "account paid in full, was a repossession," "account paid in full, was a voluntary surrender," or "voluntary surrender," to name just a few. There is a significant difference between these statuses, not the least of which is that some indicate the lack of a deficiency after the lender takes possession of the vehicle.

A2. *Please describe, in detail, the patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to consumer reporting agencies. . . .*

**Reckless Granting Of Credit**

One of the biggest problems with the accuracy of credit reports is very simple - the way in which furnishers have aided and abetted identity theft with their recklessly low security controls in their granting of credit. While identity theft may not numerically comprise the absolute greatest number of inaccurate items, they certainly constitute the most serious item. Identity theft imposes extremely high costs on the victim (both financially and emotionally) as well as the credit system. With an estimated ten million consumers discovering they were the victim of some form of identify theft in a twelve month period – the fastest growing crime in this country[39] - the failure of furnishers to exercise more care in opening new accounts is reprehensible. We could not put it any better than a recent federal District Court judge, who stated:

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[38] Robert B. Avery, Paul S. Calem, and Glenn B. Canner, *Credit Report Accuracy and Access to Credit*, Federal Reserve Bulletin, Summer 2004, at 297-322, available at www.federalreserve.gov/pubs/bulletin/2004/summer04_credit.pdf.

[39] Federal Trade Commission, *Identity Theft Survey Report* (Sept. 2003), *available at* http://www.ftc.gov/os/2003/09/synovatereport.pdf.

> In an age of rampant identity theft, it is irresponsible to allow consumers to open credit cards over the telephone, without ever requiring written verification of that consumer's identity. Citibank did not even bother to save the specific intake information that it collected over the telephone when this account was opened. These sloppy business practices facilitate identity theft. Citibank's lax record keeping permits a thief to easily accumulate thousands of dollars of debt in the name of an innocent consumer once the thief has acquired the consumer's social security number. At no time is the consumer given the opportunity to confirm that he or she ever agreed to be liable for the debt. Although the FDCPA does not punish Defendants for continuing to attempt to collect this debt when their proof of verification was weak, the Court admonishes Defendants and their clients that both good business practices and good citizenship require them to do their part to prevent identity theft.[40]

**Debt Buying**

The purchase and transfer of old consumer debts creates another huge source of inaccurate information. The re-aging of old debts, as discussed above, is but one of these problems. Other problems include pursuing collection against consumers who are not liable on the account and not providing the name of the original creditor and type of creditor involved. When debt buyers collect a debt that is several decades old,[41] it's not just re-aging that is an issue – the first issue is whether the debt is still even valid, since some states prohibit collection after the passage of the statute of limitations. Furthermore, there may be an issue of whether the consumer really still owes the debt - the FTC alleged that 80% of the consumers from whom one debt buyer collected from never even owed the debt[42] - or whether they paid it or otherwise resolved it.[43] With records long gone due to the passage of time, it's the consumer's word against the presence of her name in an electronic list purchased by the debt buyer.

Indeed, the fundamental problem is that debt buyers and collectors often are given nothing more than a list of debts.[44] There is no account application, original agreement, history of periodic statements, or indication of whether any of the debt was disputed with the creditor. The debt buyer is at fault for collecting debts on this flimsy record, and the original creditor is at fault for not providing more documentation. Both parties should be required to revise their procedures, as discussed in the Response to A.4 below.

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[40] Erickson v. Johnson, 2006 WL 453201 (D. Minn. Feb. 22, 2006).
[41] For an example of a debt buyer attempting to collect on a nearly 30 year old debt, *see* Rosenberg v. Cavalry Investments, LLC, 2005 WL 2490353 (D. Conn. Sept. 30, 2005).
[42] *See* FTC Press Release, *FTC Asks Court to Halt Illegal CAMCO Operation; Company Uses Threats, Lies, and Intimidation to Collect "Debts" Consumers Do Not Owe* (Dec. 8, 2004), *available at* www.ftc.gov/opa/2004/12/CAMCO.htm.
[43] *See, e.g.,* Asset Acceptance Corp. v. Proctor, 804 N.E.2d 975 (Ohio Ct. App. 2004) (consumer claimed that he made payments toward amount claimed to be owed).
[44] *See, e.g.*, Atlantic Credit and Finance, Inc. v. Giuliana, 829 A.2d 340 (Pa. Super. 2003) (striking collection complaint of debt buyer for failure to produce a cardholder agreement and statement of account, as well as evidence of the assignment from creditor to debt buyer); First Selection Corporation v. Grimes, 2003 WL 151940 (Tex Ct. App. Jan. 23, 2003)

"Zombie" debt collection is another practice that impairs the accuracy of the credit reporting system. This is the debt buyer's practice of offering debtors a new credit card account, then slapping the old debts onto the account. Not only does this re-age the debt, but the debt buyers also usually violate the FDCPA in so doing.[45] Zombie debt collection also impugns the integrity of the credit reporting system by disguising old debts as new tradelines.

Debt buyers are inherently unreliable, as are many collectors. As discussed in the Response to A.4 below, they should be held to a higher standard than other furnishers.

**Bankruptcy Issues**

Any report mentioning a bankruptcy can have a detrimental impact on the consumer. Thus it is important that the report accurately indicate what kind of bankruptcy is involved and the proper status of any bankruptcy proceeding. The Metro 2 format requires that a furnisher specify in some detail the nature of any reference to bankruptcy.

Metro 2 clearly distinguishes between the primary and secondary consumers. Both the base segment and the associated consumer segments have a field for consumer information indicators. In the base segment, the consumer information indicator provides information about the primary consumer only; the furnisher should not report any bankruptcy information concerning an associated debtor here. The associated consumer segment of the Metro 2 format has its own field for the bankruptcy codes appropriate to the secondary consumer(s). The record should therefore be clear which of two joint obligors has filed bankruptcy, and it should be entirely possible to separately track and report independently the accurate status of each consumer.[46]

Despite these specific instructions, consumer reports on one consumer often include information about a bankruptcy filed by the other obligor This inaccuracy was not resolved until a major class action lawsuit forced the CRAs to change their procedures.[47] However, the furnishers share much of the blame for this problem, and should have been held accountable for their systemic failure to maintain accuracy.

Another frequent problem with bankruptcy reporting is the failure to accurately report debts discharged in bankruptcy. Metro 2 instructions require that debts discharged in bankruptcy be reported with a zero balance. Yet often furnishers will continue to inaccurately report a debt as seriously past due with a significant balance, information which is much more negative than

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[45] Carbajal v. Capitol One, F.S.B., 2003 WL 22595265 (N.D. Ill. Nov. 10, 2003).

[46] According the Metro 2 Manual, the status of such a bankruptcy account should be reflected as follows:

> For joint accounts where only one borrower files bankruptcy, report one Base Segment for the account with the Consumer Information Indicator (CII) set to the appropriate bankruptcy code for the borrower who filed bankruptcy. The CII for the other consumer should be blank. The Account Status (field 17A) should reflect the status of the ongoing account for the consumer who did not file bankruptcy.

Metro 2 Manual at 6-5.

[47] Clark v. Experian Information Solutions, 2004 WL 256433 (D.S.C. Jan. 14, 2004).

correctly reporting that the debt has been discharged in bankruptcy.[48] This error deprives the debtor of the legally provided "fresh start" of a bankruptcy discharge and is time consuming and expensive to correct. Furthermore, this problem happens with alarming frequency, and sometimes is used by creditors and debt collectors as an attempt to get the debtor to pay a debt for which he is not legally obligated.

A3. *Please describe, in detail, any business, economic, or other reasons for the patterns, practices, and specific forms of activity described in item A2.*

One reason for the inaccuracies in the credit reporting system is the CRAs' and furnishers' disregard of their obligations when consumers dispute items, a topic discussed below in our Response to A.8. At present, furnishers treat disputes as nuisances and devote correspondingly little effort to them. The underlying problem is that there appears to be little economic incentive to conduct true reinvestigations. A real investigation would cost the furnishers real money.

In fact, furnishers actually have a positive economic incentive for not conducting an investigation and keeping negative information on a consumer's credit record – even if it is inaccurate. Maintaining negative information on a report limits the consumer's options to obtain other, less expensive debt, and is often the impetus to force a consumer to pay the furnisher even on an unjust claim. It has even been alleged that furnishers deliberately reward fraud investigators for finding against a consumer by tying their salaries to their ability to contain losses.[49]

Even more egregious are furnishers who have used credit reporting to collect debts from consumers who they KNEW did not owe the debt, or have used negative information to pressure family members or authorized users not liable on debt. For example, a court found that First USA Bank's reinvestigation of a consumer's claim that his wife fraudulently opened accounts in his name ignored evidence that signatures on credit card applications did not match the consumer's signature on his driver's license.[50] In another case, a furnisher continued to report a fraud account for a 77 year old widow, despite the fact that the furnisher's executives KNEW the widow was the victim of identify theft by her granddaughter - and at one point, the furnisher recommend that the widow's credit rating for revolving accounts be demoted to the worst possible score despite knowing about the identity theft.[51] Numerous other cases of furnishers collecting debts from family members abound.[52] Debt buyers are even more notorious for pursuing non-liable parties, with the FTC alleging that "as much as 80 percent of the money [one

[48] *See, e.g.*, Helmes v. Wachovia Bank, N.A. (*In re* Helmes), 336 B.R. 105 (Bkrtcy. E.D. Va. 2005). The comments of Evan Hendricks contain additional information regarding this issue and we refer the Agencies to those comments.
[49] Carrier v. Citibank (South Dakota), N.A., 383 F. Supp.2d 334 (D. Conn. 2005).
[50] Bruce v. First U.S.A. Bank, N.A., 103 F. Supp. 2d 1135 (E.D. Mo. 2000) (No one from First USA's investigation unit spoke with the consumer or his former wife about the fraudulent accounts).
[51] Bach v. First Union Nat. Bank, 149 Fed.Appx. 354 (6th Cir. August 22, 2005) (resulting $2.6 million jury punitive damage award vacated and remanded).
[52] *See e.g.* Johnson v. MBNA Am. Bank, NA, 357 F.3d 426 (4th Cir. 2004).

debt buyer] collects comes from consumers who never owed the original debt in the first place."[53]

The risk of an occasional lawsuit appears not to have overcome these other economic incentives. The result is persistent inaccuracies in credit reports, which harms both consumers and creditors. Until the failure to conduct a real investigation becomes more expensive than not conducting a real investigation, the current system will remain broken. Furthermore, any protections for identity theft victims cannot be effective in the absence of a real investigation.

A4. *Please describe, in detail, the policies and procedures that a furnisher should implement and maintain to identify, prevent, or mitigate those patterns, practices, and specific forms of activity that can compromise the accuracy and integrity of information furnished to a consumer reporting agency.*

**Original Creditors**

Original creditors must be required to retain the operative records for any account for which they are reporting a tradeline. These documents would include the original account applications, original contract or agreements, any billing statements, any contract modifications or forbearance agreements, any records of disputes, and for real estate secured loans, the settlement package (HUD-1, RESPA Good Faith Estimate, appraisal, etc)

Several cases has shown that some creditors fail to keep these key records for an account, most notably in the Johnson v. MBNA case, where MBNA admitted that it fails to retain records such as the original account application for more than 5 years.[54] This failure to keep records resulted in MBNA being unable to demonstrate whether the consumer was a joint account holder or merely an authorized user, despite trying to hold the consumer liable as the former.[55]

In this day and age of computerized storage of information, furnishers cannot be allowed to use the excuse that it is too costly or voluminous to retain such records (which can be electronically stored as PDF or image documents to maintain the consumer's signature). Indeed, credit card slips are now electronically retained by merchants[56] - if the merchants can retain even individual credit card receipts in their systems, the creditors should be able to maintain the more limited documents of application, agreement, and billing statements.

[53] *See* FTC Press Release, *FTC Asks Court to Halt Illegal CAMCO Operation; Company Uses Threats, Lies, and Intimidation to Collect "Debts" Consumers Do Not Owe* (Dec. 8, 2004), *available at* www.ftc.gov/opa/2004/12/CAMCO.htm ("Many consumers pay the money to get CAMCO to stop threatening and harassing them, their families, their friends, and their co-workers.").
[54] Johnson v. MBNA Am. Bank, NA, 357 F.3d 426 (4th Cir. 2004).
[55] *See also* Deaville v. Capital One Bank, 2006 WL 845750 (Capital One admits that they don't keep original copy of credit card disclosures sent to consumers; credit card account used for zombie debt collection); Citibank (S.D.) Nat'l Assn. v. Whiteley, 149 S.W.3d 599 (Mo. Ct. App. 2004) (collection case; Citibank could not offer up original agreement or any other documentation on account).
[56] *See, e.g.*, Symbol Technologies, *Federated Department Stores Saves Millions of Dollars in Credit Card Dispute Resolution Costs with Electronic Signature Capture*, SymbolSolutions, January 2003.

Thus, original creditors must be required to retain original records to maintain the accuracy and integrity of the credit reporting system. If they do retain original records, an original creditor can rely on their records, so long as they actually review them when there is a dispute. However, if a consumer disputes an account or a charge based upon information that cannot be determined by records alone, the original creditor must be required go beyond its records. For example, in an identity theft case involving a forgery, the creditor must be held to the same standard as CRAs, which are required to compare an exemplar of handwriting submitted by the consumer with the signature on the account application.[57] In a case involving a telephone application, the creditor should be required to review phone records showing that the consumer never placed the phone call opening the account.

**Debt Buyers and Collectors**

Because of their inherent unreliability due in part to the age of the debts and incomplete records, debt buyers and collectors should be held to an even higher standard than an original creditor, who at least have some stake in the accuracy and integrity of the information they furnish as well as in maintaining good will with actual customers. Original creditors also have a stake in the integrity of the credit reporting system itself, to ensure that potential customers who are good credit risks are not wrongfully excluded. Debt buyers and collectors do not have any interests in preserving good relations or ensuring that the credit reporting system works properly (as long as it works for their benefit). Debt buyers and collectors have only one goal and one interest– to elicit payment out of the consumer (whether or not it is the right consumer).

The concept of holding certain furnishers as less reliable and therefore subject to a higher standard would not be a novel one under FCRA jurisprudence. The converse is certainly true - when a CRA has no reason to believe a furnisher is inaccurate, it is under no obligation to take additional steps initially to verify the accuracy of its information prior to being notified by the consumer of a putative inaccuracy.[58] So when a CRA does have reason to believe that a source is inherently unreliable, that furnisher must be held to a higher standard. The Regulatory Agencies should also hold these furnishers to a higher standard.

Thus, a debt buyer or collector must be required to obtain the original records from the creditor. A reasonable procedure is to require debt buyers and collectors to obtain and review certain records before furnishing information to a CRA. For example, in a credit card case, the debt buyer must be required to obtain and review the consumer's account application, original agreement, history of periodic statements, and any record showing whether any of the debt was disputed with the creditor. At a minimum, if the consumer disputes the debt and the debt buyer does not have adequate original documentation, the tradeline must be deleted from the consumer's file.

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[57] Cushman v. Trans Union Corp., 115 F.3d 220 (3d Cir. 1997).

[58] *See, e.g.,* Henson v.. CSC Credit Services, 29 F.3d 280, 285 (7th Cir.1994); *cf.* Cushman v. Trans Union Corp., 115 F.3d 220, 224-26 (3rd Cir.1997) (holding that where a consumer reporting agency relies on a reliable source, it does not have a duty to go beyond its original source unless a consumer alerts a consumer reporting agency to an alleged error)

In fact, the FTC specifically required a debt buyer to review the files of an original creditor in its enforcement action against Performance Capital Management.[59] This standard should be applied to all debt buyers, assignees, and collection agencies.

A5. *Please describe, in detail, the methods (including technological means) used to furnish consumer information to consumer reporting agencies. Please describe, in detail, how the use of these methods can either enhance or compromise the accuracy and integrity of consumer information that is furnished to consumer reporting agencies.*

The CRAs encourage reporting through the use of an electronic medium through Metro 2, the standard automated data reporting format created by CDIA. The CRAs also use a number of other standard reporting formats, such as the Universal Data Form (UDF) to provided updated information.

One consequence of this reliance upon electronic communication is that even when a consumer successfully disputes inaccurate information, the incorrect information will re-appear or be "reinserted" if the correction is not reflected with precision in the same database used to report current information on a weekly or monthly basis to the CRAs. In other words, the reliance on data furnished using Metro 2 is so complete that the latest Metro 2 "information dump" will often supersede a correction made earlier by a creditor if the creditor failed to also correct the data put into its Metro reports.[60] The problem of reinsertion should be addressed by the guidelines, and the Regulatory Agencies should require furnishers to ensure that their systems do not continue to report erroneous information after it has been deleted or corrected.

Electronic reporting and Metro 2 are certainly not a flawless system. However, the failure to report electronically or use Metro 2 creates even more inaccuracies. For example, manual reporting and its conversion to electronic format are prone to transcription errors. While the CRAs claim that up to 80% of their subscribers or furnishers have converted to the Metro 2 reporting system, we question whether the 80% figure is based on the data being reported and not the percentage of furnishers who submit the data. Furthermore, not all furnishers use Metro 2 properly. Some furnishers fail to report essential information, such as whether the tradeline is disputed.

Furnishers who assign different values to the information in the same field also compromise the accuracy and integrity of the credit reporting system. For example, in Cassara v. DAC Services, a truck driver history database used an overly broad definition of what constituted an "accident," leading employers to use different standards to report accidents. The court held rightfully that these discrepancies raised a genuine issue as to the accuracy of such reports, stating:

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[59] U.S. v. Performance Capital Management (Bankr. C.D. Cal 2000) (consent decree), *available at* www.ftc.gov/opa/2000/08/performconsent.htm.

[60] *See e.g.*, Evantash v. G.E. Capital Mortgage Serv., 2003 WL 22844198 (E.D. Pa. Nov. 25, 2003). The comments of Evan Hendricks contain additional information regarding reinsertion and we refer the Agencies to those comments.

> if (furnishers) in that industry are to communicate meaningfully among themselves within the framework of the FCRA, it proves essential that they speak the same language, and that important data be reported in categories about which there is genuine common understanding and agreement. Likewise, if [the CRA] is to "insure maximum possible accuracy" in the transmittal of that data through its reports, it may be required to make sure that the criteria defining categories are made explicit and are communicated to all who participate.[61]

While the initial reporting of information in electronic format should be encouraged, the opposite is true for handling disputes. We have serious concerns about the ACDV process and its reduction of disputes into electronic format, discussed below in the Response to A.8.

A6. *Please describe, in detail, whether and to what extent furnishers maintain and enforce policies and procedures to ensure the accuracy and integrity of information furnished to consumer reporting agencies, including a description of any policies and procedures that are maintained and enforced, such as policies and procedures relating to data controls, points of failure, account termination, the re-reporting of deleted consumer information, the reporting of the deferral or suspension of payment obligations in unusual circumstances, such as natural disasters, or the frequency, timing, categories, and content of information furnished to consumer reporting agencies. Please assess the effectiveness of these policies and procedures and provide suggestions on how their effectiveness might be improved or enhanced. . . .*

We are not privy to the furnishers' policies and procedures to ensure the accuracy and integrity of information furnished to CRAs. What we do know is that these policies and procedures have not been adequate to meet this goal. The policies and practices that we do know about, such as the failure to retain records in Johnson v. MBNA and the automated dispute system, are actually counterproductive to the goal of accuracy and integrity of information.

*A7. Please describe, in detail, any methods (including any technological means) that a furnisher should use to ensure the accuracy and integrity of consumer information furnished to a consumer reporting agency.*

Furnishers who use the Metro 2 format must properly follow the instructions for that system, which appear to be written to comply with the FCRA and ensure accuracy. They must also be required to adequately train, supervise, and monitor their employees to properly follow the instructions for Metro 2. Other suggestions are in responses to questions A.4 and A.5.

A8. *Please describe, in detail, the policies, procedures, and processes used by furnishers to conduct reinvestigations and to correct inaccurate consumer information that has been furnished to consumer reporting agencies. Please include a description of the policies and procedures that furnishers use to comply with the requirement that they ''review all relevant information provided by the consumer reporting agency'' as stated in section 623(b)(1)(B) of the FCRA.*

[61] Cassara v. DAC Services, Inc., 276 F.3d 1210 (10th Cir. 2002).

The reinvestigation system in its current form is fundamentally flawed, and we have stated so repeatedly in testimony to Congress and the Federal Reserve Board.[62] Two of the main problems are that (1) CRAs do not provide furnishers with the documentation of errors that consumers send to the CRAs; and (2) furnishers' reinvestigations of disputed information typically involve merely verifying that the information matches their own computer records, without undertaking a meaningful examination of the underlying facts. The continued result of this lackadaisical reinvestigation system is that consumers find it extremely difficult, frustrating, and expensive to dispute errors, which all too often remain uncorrected long beyond the timeframe contemplated by the FCRA.

**Automation Creates Flawed Reinvestigations**

All too commonly, CRAs, furnishers, and others maintain inadequate procedures to ensure accuracy and fail to take complaints from consumers either seriously or seriously enough. Testimony in cases suggests that CRAs receive tens of thousands of consumer disputes each week (one agency reportedly receives between 35,000 and 50,000 per week). Some CRAs have quotas for the number of consumer disputes agency employees must process. CRA employees have testified that employees are required to process one dispute every four or six minutes in order to meet quotas.[63]

In order to crunch down the time for a consumer's dispute into a mere 4 to 6 minutes, CRAs and furnishers have developed a highly automated, computer-driven system that precludes any meaningful reinvestigation. A consumer's dispute is communicated using a Consumer Dispute Verification form (CDV). An automated version of the form, communicated entirely electronically, is known as Automated Consumer Dispute Verification (ACDV). According to one CRA, 52% of its data furnishers participate in ACDV system.[64] Furthermore, all three CRAs collaborated through CDIA to create an automated on-line reinvestigation processing system "E-OSCAR."

This automated system, like the Metro 2 format, is heavily dependent upon standardized dispute codes used to communicate the nature of the dispute. Difficulties with this level of automation have been noted by consumer counsel. Most critically, it appears that use of this automated system has resulted in the problem that furnishers merely verify the existence of disputed information, not reinvestigate disputes.

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[62] *See* National Consumer Law Center, et al, *Comments to the Federal Reserve Board's Request for Information for the Study on Investigations of Disputed Consumer Information Reported to Consumer Reporting Agencies, Docket No. OP-1209*, September 17, 2004, *available at* www.consumerlaw.org. *See also* Testimony of Anthony Rodriguez before the Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (2003). These documents are attached as Attachments 1 and 2 to these comments. The comments of Evan Hendricks contain additional information regarding this issue and we refer the Agencies to those comments.

[63] *See* Cushman v. Trans Union Corp., 115 F.3d 220, 224-25 (3d Cir. 1997). *See also* Deposition of Regina Sorenson, Fleischer v. Trans Union, Civ. Action No. 02-71301 (E.D. Mich. Jan 9, 2002).

[64] Statement of Harry Gambill, Chief Executive Officer, Trans Union, L.L.C., before the Subcommittee on Financial Institutions and Consumer Credit, June 4, 2003.

The industry has asserted that approximately 80% of consumer disputes are written.[65] These written disputes, often containing a detailed letter and other documentation, are translated into a two digit code that the credit reporting agency employee believes best describes the dispute. Thus, a consumer's careful detailing of a specific dispute, fashioned to make detection and correction easy, may be relegated to a generalized code.[66]

The code is sent to the furnisher for verification. They are often communicated alone, without supporting documentation provided by the consumer. Typically, underlying and essential documentation of inaccuracies such as account applications, billing statements, letters, and the like, are left out of the reinvestigation process while both the CRA and furnishers rely on the automated dispute process and its coding of information. In fact, the policies and practices of the CRAs are to not forward documents and other information to furnishers that would allow the furnisher to evaluate the truthfulness and completeness of the disputed information.[67]

Thus, the automated dispute system actively violates the FCRA's requirement at § 1681i(2) that all relevant information about the dispute be communicated. And if all relevant communication is not forwarded, how can the furnisher comply with the requirement at § 1681s-2(b)(1)(B) to "review all relevant information" provided by the CRA? The requirement to review all relevant information has become a nullity because such information is never communicated.

Furthermore, this system permits a furnisher to simply check a box indicating that the disputed information has been verified, an exercise which aids and abets the second problem that furnishers fail to properly investigate disputes. In addition, the dispute codes are not uniformly applied among the major CRAs, so the same information disputed in the same manner by a consumer may be categorized differently by different CRAs.

Once the disputed information is purportedly reinvestigated, the CRAs then send generic and uninformative letters stating that an investigation has been made, without including any details as to whom they have contacted and what information was obtained or relied upon for a final determination.[68]

In order to correct this massive flaw in the credit reporting system, CRAs must be required to convey to furnishers the actual documents that support the consumer's dispute, as explicitly required by the FCRA. Failure to do so should be per se unreasonable. The Regulatory Agencies must also set forth guidelines that a furnisher cannot simply blindly rely on the ACDV form, but must ensure that it has the complete dispute documentation from the consumer.

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[65] *See* Deposition of Eileen Little, Evantash v. G.E. Capital Mortgage, Civ. Action No. 02-CV-1188 (E.D. Pa. Jan. 25, 2003).

[66] For a criticism of this system, *see* the Seventh Circuit's decision in Ruffin-Thompkins v. Experian Information Solutions, 422 F.3d 603 (7th Cir. 2005) (noting "the opaque notice of dispute sent by Experian to U.S. Bank").

[67] In just one reported example, an employee of Trans Union actually testified that it is Trans Union's policy to send consumer dispute verification forms without ever including the underlying documents. Crane v. Trans Union, LLC, 282 F. Supp. 2d 311, 316 (E.D. Pa. 2003).

[68] The Seventh Circuit has called an example of these letters a "meaningless communication". Ruffin-Thompkins v. Experian Information Solutions, 422 F.3d 603 (7th Cir. 2005).

**Furnishers' Inadequate Investigation**

Consumer advocates repeatedly confirm that regardless of where the dispute is made (directly with the furnisher or through a CRA), furnishers are simply *not* conducting meaningful reinvestigations; they do *not* train their employees on effective reinvestigation procedures,[69] and they repeatedly default simply to verifying the existence of an account and the disputed information itself. Rarely do furnishers actually research the underlying dispute, rarely are documents reviewed, and too often there is no analysis of the furnishers' own data for inconsistencies and errors.

Advocates also know from recurring cases that the standard response of furnishers is to ignore documentation even once the consumer is successful in getting it into their hands. In Johnson v. MBNA, the furnisher's employees testified that it is their practice to merely confirm the name and address of consumers in their computers and note from the applicable codes that the account actually belongs to the consumer. These employees testified that they *never* consult underlying documents such as account applications to determine accuracy of disputed information.[70]

In another case, a consumer disputed information in her Equifax credit report, which the furnisher simply confirmed, even though the consumer had already won a court decision that she did not owe the debt. When the consumer again disputed the entry with Equifax, the furnisher again confirmed the debt, plus it increased the amount owed from $488.00 to $829.00. Yet, the furnisher asserted that it could rely on a state department of licensing report and that it had no further duty to investigate the accuracy of the information.[71]

All of these examples show that furnisher reinvestigations have consisted primarily of checking information in their records. Checking information against computer records is not an investigation of whether information is accurate, it is simply verification of files. That is NOT the standard in the FCRA.

Some furnishers rely on third parties to both gather information from public sources and conduct the reinvestigations of the gathered information. Even if their selection of a third party vendor is reasonable, the furnisher should remain liable, as the duty to conduct a reasonable reinvestigation is a non-delegable task.

Thus, in order for the credit reporting system to work correctly, the Regulatory Agencies must significantly increase the duties upon furnishers in a dispute in two respects:

- Furnishers must be required to investigate the dispute rather than merely verifying that the disputed information appears in their own records. At a minimum the furnisher's reinvestigation must involve reviewing the actual documents provided by the consumer.

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[69] *See* Deposition of Gino Archer, witness on behalf of Cavalry Investments, LLC, Rosenberg v. Calvary Investments, LLC, U.S. Dist. Ct. D. Conn., Case No. 03-cv1087, at 8.

[70] Johnson v. MBNA, 357 F. 3d 426 (4th Cir. 2004)

[71] Betts v. Equifax Credit Information Services, 245 F. Supp. 2d 1130 (W.D. Wa. 2003).

Depending on the nature of the dispute, the furnisher may also have to review documents in its own possession or in the possession of an earlier holder of the debt, and may have to contact third parties. In short, the reinvestigation must make a substantive determination of the validity of the dispute.

- Furnishers should be required to rebut the consumer's specific disputes by providing to the consumer and the CRA documentation that shows that the information furnished is correct. Furnishers should not be allowed simply to tell the CRA that the consumer is wrong and the original information was correct, and CRAs should not be allowed to accept such a report. Instead, the furnisher should be required to give the consumer and the CRA the underlying information - copies of documents with original signatures to rebut a forgery claim, for example, or copies of the payment record to demonstrate that the claimed balance is correct.

A9. *Please describe, in detail, the policies, processes, and procedures that furnishers SHOULD use to conduct reinvestigations and to correct inaccurate consumer information that has been furnished to consumer reporting agencies.*

Many furnishers are already under an obligation to investigate disputes for their major product categories, which are discussed in detail in the Response to B.1. Some of these regulations set forth detailed requirements for investigation. For example, the Official Staff Interpretations under the Truth in Lending Act suggests that creditors take some of the following steps if the consumer claims unauthorized use:[72]

i. Reviewing the types or amounts of purchases made in relation to the cardholder's previous purchasing pattern.

ii. Reviewing where the purchases were delivered in relation to the cardholder's residence or place of business.

iii. Reviewing where the purchases were made in relation to where the cardholder resides or has normally shopped.

iv. Comparing any signature on credit slips for the purchases to the signature of the cardholder or an authorized user in the card issuer's records, including other credit slips.

v. Requesting documentation to assist in the verification of the claim.

Furnishers should be under the same types of obligations when they conduct reinvestigations they receive from CRAs as when they receive direct disputes from consumers. This should not merely be a similar duty, but an identical duty based on an identical statutory term. Under TILA's Fair Credit Billing Act, Congress requires a credit card issuer to "conduct[] an investigation" of a consumer's dispute. 15 U.S.C. § 1666(a)(3)(B)(ii). Furnishers are required to "conduct an investigation" with respect to disputed information under §§ 1681s-2(a)(8)(E)(i) and (b)(1)(A). The Federal Reserve Board and the courts have repeatedly stated

[72] Federal Reserve Board, Official Staff Interpretations to 12 C.F.R. § 226.12(b) at paragraph 3.

this same phrase creates a duty to conduct a "reasonable" investigation.[73] Furnishers should be under the same reasonable investigation standards under the FCRA

For a reasonable investigation, furnishers should be to undertake the same steps as those required under TILA, FCBA and Regulation Z. They should be required to consult their own record - not just computer records but actual documents in their files - and to review any documents that the consumer has sent to them or to the CRA. Furnishers should also be required to request documentation from third parties, such as merchants or police departments or telephone companies.[74] They should review security measures, such as signatures or PIN entries, when determining whether the consumer actually incurred the debt or not.

Furthermore, furnishers should be required to report their investigation results in no less detail than that required by reporting procedures for the initial furnishing of the information. For most creditors, this obligation means that the information should be at least as specific and detailed as called for in the Metro 2 format. Other outside benchmarks for accuracy may also exist. For example, regulated utilities are subject to general codes of conduct issued by state public utility commissions or the Federal Energy Regulatory Commission. Medical information bureaus will also have standards for conveying accurate and useful information, such as completing Medicare forms, as may other specialized forms of CRAs.

*B1. Please identify the circumstances under which a furnisher should (or alternatively, should not) be required to investigate a dispute concerning the accuracy of information furnished to a consumer reporting agency based upon a direct request from the consumer, and explain why.*

Many furnishers are already under an obligation to investigate disputes for their major product categories. The addition of FCRA dispute obligations should add only marginal costs, since they should have a pre-existing system set up to handle disputes for these products. For example:

> **Credit cards** – consumers already have the right to dispute credit card transactions under the Truth in Lending Act, 15 U.S.C., §§ 1601-1666j. In fact, they have *three* separate dispute rights with respect to credit cards: (1) protections against unauthorized use under 15 U.S.C. § 1643; (2) the Fair Credit Billing Act at 15 U.S.C. § 1666; and (3) the right to assert claims and defenses under 15 U.S.C. § 1666i.
>
> **Real estate secured loans** – consumers have dispute rights available under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(e)(1)(B), namely the right to require mortgage servicers to investigate disputes by sending a qualified written request.

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[73] Regulation Z, 12 C.F.R. § 226.13(f) and note 31; Burnstein v. Saks Fifth Avenue & Co., 208 F.Supp.2d 765, 772-73 (E.D. Mich. 2002).
[74] Olwell v. Medical Information Bureau, 2003 WL 79035 (D. Minn. Jan. 7, 2003) (a reasonable jury could find that failure to contact outside sources during reinvestigation was unreasonable); Bruce v. First U.S.A. Bank, 103 F. Supp. 2d 1135 (E.D. Mo. 2000).

**Home equity lines of credit** – these accounts are covered by the Fair Credit Billing Act, which applies to all open-end credit accounts. 15 U.S.C. § 1666.

**Deposit accounts** – consumers have dispute rights with regard to their ATM, debit card, and other electronic transactions under the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693f and 1693g. Other checking account transactions may be disputable under the Uniform Commercial Code or the Check Clearing for the 21st Century Act.

Thus, there are only a few product lines for which many furnisher/creditors do NOT have a pre-existing dispute obligation, the most notable being automobile-secured credit and high cost fringe credit (payday loans, refund anticipation loans, auto title loans). The addition of these product lines to a furnisher's dispute responsibilities should not impose a great burden. In fact, the product lines for which there are pre-existing dispute rights comprise the great majority of consumer disputes for certain furnishers. According to the Office of Comptroller of Currency, these product lines account for 80% of complaints to national banks.[75]

There is no good reason to leave out the remaining types of products or to leave out non-financial institution furnishers, especially since they involve products or entities that are often abusive. The problems with subprime auto loans, especially "yo-yo" sales, is well documented.[76] There is no conceivable reason to let off fringe creditors, such as payday loan outlets and refund anticipation lenders, from having to handle disputes when mainstream credit card issuers and mortgage companies must deal with them. There is also no reason to let off debt buyers and collection agencies from direct dispute responsibilities since as discussed above, these types of furnishers are inherently unreliable and prone to inaccurate reporting. Of all furnishers, they more than anybody should be subject to a duty to investigate consumer disputes over erroneous reporting.

*B2. Please describe any benefits or costs to consumers from having the right to dispute information directly with the furnisher, rather than through a consumer reporting agency, in some or all circumstances. Please address the circumstances under which direct disputes with furnishers would yield more, fewer, or the same benefits or costs for consumers as disputes that are first received and processed through the consumer reporting agencies and then routed to furnishers for investigation. Please quantify any benefits or costs, if possible.*

If consumers have the right to directly dispute credit reporting errors with furnishers, it would go a long way toward resolving one of the fundamental problems of the reinvestigation process - the failure of the CRAs to properly forward a consumer's actual written dispute plus supporting documentation to the furnisher, as discussed in our Response to A.8. As discussed in

[75] Office of Comptroller of Currency - Customer Assistance Group, *PowerPoint Presentation for "Ombudsman: Will the Canadian System Be a Model For the United States?"*, Consumer Financial Services Committee of the American Bar Association, Spring 2006 Meeting (April 6, 2006)

[76] A yo-yo sale or spot delivery occurs when the dealer sells a vehicle and gives possession to the consumer on the spot, often taking the consumer's old vehicle as a trade-in. The dealer later tells the consumer that the financing deal has fallen through, and the consumer will have to pay more in financing costs or purchase a different car. *See* National Consumer Law Center, Unfair and Deceptive Acts and Practices, § 5.4.5 (6th ed. 2004 and Supp) (description of yo-yo abuses).

that Response, the entire ACDV process is an impediment to compliance with § 1681i(a)(2), which requires that all relevant information about a dispute be provided to the furnisher. Requiring furnishers to investigate complaints directly from consumers could mitigate some of the enormous flaws of the automated reinvestigation process, which one federal court of appeals has criticized as being "opaque".[77]

Direct disputes might also rein in some of the problems where furnishers ignore documentation from consumers about errors or fraud, as described in the Response to A.3. Because the FCRA requires the furnisher to "review all relevant information provided by the consumer," when there is a direct dispute (§ 1681s-2(a)(8)(E)(ii)), furnishers will be required by the statute itself to pay attention to the documentation submitted by consumers.

*B3. Please describe any benefits to furnishers, consumer reporting agencies, or the credit reporting system that may result if furnishers were required to investigate disputes based on direct requests from consumers in some or all circumstances. Please quantify any benefits, if possible.*

The primary reason to require all furnishers to investigate direct disputes is simply that it will result in a more accurate credit reporting system. A more accurate system means that consumers who are truly good risks do not mistakenly suffer bad credit reporting, which harms not only the consumer but other creditors who would have found the consumer to be a profitable and reliable customer. The harms from inaccurate reporting are not insubstantial. For example, the erroneous reporting of "included in bankruptcy" affected four million consumers.[78] That's four million consumers shut off from mainstream affordable credit, who may have been good customers but were never given the chance.

Many of the problems discussed in this comment and witnessed by consumer counsel are not isolated incidents affecting a handful of consumers, but systems problems affecting millions. Even identity theft is not just a problem of "sporadic crime," when 10 million consumers may be potentially affected in one year.

Thus, when considering the cost of direct disputes to a furnisher, the costs to the entire community of creditors must be considered. While it might cost a furnisher $25 to process a dispute, it may cost a fellow creditor thousands in lost profits.[79] And of course, the failure to investigate might wrongfully cost a consumer thousands of dollars as well as countless hours of grief and aggravation because the error remains uncorrected.

Another benefit of direct disputes with the furnisher will be the standardization of different types of consumer complaints, something much prized by the industry. With direct dispute capability, a credit card issuer will not have to deal with two different standards for

[77] Ruffin-Thompkins v. Experian Information Solutions, 422 F.3d 603 (7th Cir. 2005).
[78] Clark v. Experian Information Solutions, 2004 WL 256433 (D.S.C. Jan. 14, 2004).
[79] For example, a bank had to place special conditions on a mortgage for a condo purchase by an identity theft victim, which led the victim to abandon the transaction. Bach v. First Union Nat. Bank, 149 Fed.Appx. 354 (6th Cir. August 22, 2005)

investigations for a credit card dispute, depending on whether the dispute involves a dispute over a particular charge or a credit reporting matter.

Finally, we know that many consumers already dispute directly with furnishers, because they do not know that they must go through the CRAs. After all, the intuitive step for most people with a problem is to deal directly with the party that is responsible for the problem, *i.e.*, the furnisher. Furnishers should be required to act responsibly and reasonably when they are directly contacted.

*B4. Please describe any costs, including start-up costs, to furnishers and any costs to consumer reporting agencies or the credit reporting system, of requiring a furnisher to investigate a dispute based on a direct request by a consumer in some or all circumstances.*

* * * * *

*Does the FCRA's section 623(a)(8)(F)(ii) timing requirement for a Notice of Determination that a consumer dispute is frivolous or irrelevant impose additional costs? If so, please provide quantitative data about such costs*.

As discussed in the Response to B.1, many furnishers already have direct dispute responsibilities. Thus, start up costs should not be extremely burdensome for them. The marginal cost of each investigation is minimal since the necessary information is typically in the possession of the furnishers; however, we have seen estimates for processing a dispute range from $25[80] to $200. These costs would be greatly exceeded by the harms to consumers who cannot obtain relief from adverse credit reporting errors.

As for the timing requirements for the Notice of Determination that a dispute is frivolous or irrelevant at 15 U.S.C. § 1681s-2(a)(8)(F)(ii), we object to any indication that the Regulatory Agencies are contemplating altering the time frame of this requirement. The 5 day window is specifically written into the statute. The statute does not give the Regulatory Agencies the authority to extend this period. Apparently, requiring furnishers to give notice within 5 days was important enough for Congress to specify the number of days in the FCRA itself, instead of reserving the issue for rulemaking. Congress's reasons for so doing are logical - it is important that the consumer receive the notice quickly, especially if it identifies additional information that the consumer can provide to get the dispute investigated (as provided by § 1681s-2(a)(8)(F)(iii)(I)). The faster the notice, the faster the consumer can gather and send additional information to the furnisher and get the dispute processed.

*B5. Please discuss whether it is the current practice of furnishers to investigate disputes about the accuracy of information furnished to a consumer reporting agency based on direct requests by consumers.*

See Response to B.1 above.

B6. *Please describe the impact on the overall accuracy and integrity of consumer reports if furnishers were required, under some or all circumstances, to investigate disputes concerning*

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[80] *Credit Cards: What's Wrong With This Bill?*, Consumer Reports at 27 (February 2004).

*the accuracy of information furnished to consumer reporting agencies based on the direct request of a consumer.*

See Responses to B.2 and B.3 above.

B8. *Please describe the potential impact on the credit reporting process if a person that meets the definition of a credit repair organization is able to circumvent section 623(a)(8)(G).*

Since we fully expect that the furnishers will supply information on the costs of credit repair organizations, we will discuss the potential impact on consumers from the reverse situation, *i.e.*, when furnishers reject legitimate disputes from consumers as being from credit repair organizations.

It has been reported that some CRAs are rejecting consumers' dispute letters erroneously believing them to come from credit repair companies. CRAs no doubt have rules or protocols for handling disputes from credit repair companies. However, these rules are inappropriately and illegally excluding legitimate consumer disputes and cause these CRAs to violate the FCRA requirements with respect to reinvestigations.

Some CRAs send consumers letters suggesting that the CRAs do not have to reinvestigate any dispute if the letter comes from any third party, not just credit repair organizations. This would include family members or someone trying to help the consumer from a social services organization. Not only is this exclusion not legally correct, it prevents the most vulnerable of consumers – those with limited literacy skills or limited English speakers, for example – from exercising their rights under the FCRA. About 1 in 20 adults in the U.S. are non-literate in English, or about 11 million people. Overall, 14% of adults have below basic literacy skills and would not be able to compose a dispute letter.[81]

The Regulatory Agencies must protect the rights of these consumers to dispute erroneous credit report information with both the CRAs and furnishers by setting clear guidelines that prohibit the CRAs and furnishers from inappropriately excluding disputes sent by family members or non-CROA agencies, such as social services providers. In fact, a furnisher who is a creditor under the Equal Credit Opportunity Act may well be violating the ECOA by excluding disputes that have been sent by a third party who has translated the letter for a non-English speaking consumer. The Americans with Disabilities Act might similarly require reasonable accommodations that include third party assistance for a blind consumer.

Finally, an argument is being advanced that attorneys cannot help consumers send direct disputes to furnishers because attorneys fall under the definition of a "credit repair organization" under § 1681s-2a(8)(G).[82] This conclusion would be highly dubious and absurd, since an attorney is a duly empowered fiduciary who acts on the consumer's behalf. Furthermore, as you

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[81] National Center for Education Statistics, *National Assessment of Adult Literacy: A First Look at the Literacy of America's Adults in the 21st Century*, Dec. 15, 2005. *See also* White and Mansfield, *Literacy and Contract*, 132 Stanford Law & Policy Rev. 233 (2002).

[82] Gregg B. Brelsford, *Why Lawyers Can't Help Challenge Credit Scores: FACTA and the Forfeiture of Consumers' Rights*, 22 GPSolo 51 (American Bar Ass'n April/May 2005).

know from the litigation over Gramm-Leach-Bliley coverage, licensed attorneys are extensively regulated and subject to strict codes of conduct. One would assume that furnishers would benefit from having a knowledgeable and skilled professional to prepare a dispute letter, since it would ensure that the letter is clearly written, adequately documented, and already reviewed to ensure it is not frivolous or irrelevant. As one court opined in a credit reporting dispute "It is inconceivable to the Court that an attorney could not represent a consumer in this regard, . . ."[83]

## III. CONCLUSION

The Regulatory Agencies have a critical task ahead of them in establishing the standards for furnisher accuracy as well as the ability of consumers to dispute credit reporting errors directly with furnishers. Ensuring the accuracy of credit reports is ever more critical given the expanding reliance on credit scores in all financial aspects of a consumer's life. Even inaccurate information that is not facially negative (such as a wrong balance on a revolving account) can significantly depress a credit score. For this reason, we urge the Regulatory Agencies to consider the recommendations above and issue guidelines that have meaningful protections for consumers.

[83] Pinner v. Schmidt, 617 F.Supp. 342 (E.D. La. 1985), *reversed in part on other grounds*, 805 F.2d 1258 (5th Cir. 1986).

United States House of Representatives
# Committee on Financial Services

## "TRUTH IN TESTIMONY" DISCLOSURE FORM

Clause 2(g) of rule XI of the Rules of the House of Representatives and the Rules of the Committee on Financial Services require the disclosure of the following information. A copy of this form should be attached to your written testimony.

| | |
|---|---|
| **1. Name:**<br>Chi Chi Wu | **2. Organization or organizations you are representing:**<br>Low Income Clients of the National Consumer Law Center |
| **3. Business Address and telephone number:**<br>77 Summer Street 10th floor<br>Boston, MA 02110<br>617-542-8010 | |
| **4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2004 related to the subject on which you have been invited to testify?**<br>☒ Yes ☐ No | **5. Have any of the organizations you are representing received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2004 related to the subject on which you have been invited to testify?**<br>☒ Yes ☐ No |
| **6. If you answered "yes" to either item 4 or 5, please list the source and amount of each grant or contract, and indicate whether the recipient of such grant was you or the organization(s) you are representing. You may list additional grants or contracts on additional sheets.**<br>HHS AOA-9/30/04-9/29/05 $150,000<br>HHS AOA 9/30/05-9/29/06 $150,000<br>HHS AOA 9/30/06-7/31/05 $150,000 | |
| **7. Signature:** [signature] 6/5/07 | |

*Please attach a copy of this form to your written testimony.*